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PRINCIPLES

OF THE LAW OF

PERSONAL PROPERTY

CHATTELS AND CHOSSES

INCLUDING SALES OF GOODS, SALES ON EXECUTION,
CHATTEL MORTGAGES, GIFTS, LOST PROPERTY,
INSURANCE, PATENTS, COPYRIGHTS, TRADE-
MARKS, LIMITATIONS OF ACTIONS, ETC.

By FRANK HALL CHILDS, LL. B.

SOMETIME PROFESSOR OF THE LAW OF PERSONAL PROPERTY,
CHICAGO-KENT COLLEGE OF LAW



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PREFACE

This work is written primarily for American law students; but, owing to the magnitude of the subject, general principles only can be given. While real property may be treated as one subject in one volume, personal property has assumed so many different forms in this commercial age, as not to be susceptible of detailed treatment in one volume; and as students' works have been published dealing with particular branches of personal property, such as Bailments, Negotiable Instruments, Partnership, Corporations, and many other subjects, this work dismisses them with brief mention, the space being devoted to other branches which though important do not justify separate treatises.

The leading principles of Sales of Goods are set forth concisely yet so completely that this volume could be used as a text-book for that branch alone; but in colleges where a separate text-book on that subject is used, that part of this work can be omitted entirely or used in the nature of a review, and enough other subjects will remain to occupy the attention of students to advantage. The same can be said of some of the other subjects.

F. H. C.

Chicago, July, 1914.

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PERSONAL PROPERTY

CHAPTER I

DEFINITIONS AND CLASSIFICATIONS OF PROPERTY.

§ 1. **Significations of Property.** The word "property," in law, has two significations, meaning, first, "something owned;" and, second, "ownership." When a person says, "This watch is my property," he means, "This watch is something owned by me;" but if he should say, "I will sell my watch for fifty dollars," and the offeree says, "All right, I'll take it," it is said that the property in the watch instantly passes from the seller to the buyer. This does not mean that "something owned" in the watch passes to the buyer, as that would be senseless; nor is it meant that the watch itself passes from the seller to the buyer, for the watch may have been elsewhere at the time, or, if present, the buyer, without touching it, might request the seller to keep it for him for a time, or the buyer already might have had the watch in his possession. It is evident that the word "property" is used here in the second meaning, that is, "ownership." The ownership of the watch, not necessarily the possession, passed instantly from the seller to the buyer as the result of their conversation. In using the first meaning—that of "something owned," the existence of the thing in question, is in mind, it being realized the thing is owned by someone¹ but without necessarily thinking of any particular person as the owner; but in the second sense of "ownership," the existence of the thing is not so much in the mind as the particular person who is interested in it and who has the legal right

1. *Harvey Co. v. Dillon*, 59 W. Va. 605, 6 L. R. A. N. S. 622.

to exercise dominion and control over it.² It is important that the student fully grasp these two meanings, as he will be confused until he does; but, the meanings once understood, he will not have the least difficulty in comprehending instantly the sense in which the word is used though it appear twice in one sentence with a different meaning.

§ 2. Classification of Property—Real—Personal—Definitions. Property in its first sense—that of “something owned,” is classified³ into Real Property, or Realty, and Personal Property, or Personalty.

Real⁴ Property is land, things therein,⁵ or annexed⁶

2. *Morrison v. Semple*, 6 Binn. 94, *Lawson, Cas. on Pers. Prop.* 1.

3. 2 Blacks. Comm. 15; 1 Andrews, *Am. Law* (2d ed.) 678.

This classification has been in use about two centuries. Previous to that time property was classified into “lands, tenements and hereditaments” and “goods and chattels.” *Warvelle, Real Prop.* (3d ed.) 27.

By the civil law tangible property was classified as “immovable” and “movable.” *Warvelle, Real Prop.* (3d ed.) 26; but immovable property does not correspond exactly to real property, nor movable property to personal property.

4. This class of property is said to be called “real” from the Latin word “res” meaning “thing,” because in an action for its recovery the thing itself could be secured; while the remedy for chattels wrongfully appropriated by another was an action for damages only against the person who had appropriated them. *Warvelle, Real Prop.* (3d ed.) 27.

5. Mineral substances in place are real property; *Sloan v. Furnace Co.*, 29 Ohio St. 568; *Whitaker v. Brown*, 46 Pa. St. 197; such as sand and gravel; *Glencoe Co. v. Hudson*, 138 Mo. 439, 60 Am. St. 560, 36 L. R. A. 804; coal; *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. 802, petroleum; *Stoughton's App.* 88 Pa. St. 198; natural gas; *Poe v. Ulrey*, 233 Ill. 56; percolating water; *Gould v. Eaton*, 111 Cal. 639, 52 Am. St. 201, *Roath v. Driscoll*, 20 Conn. 522, 52 Am. Dec. 352; *Bloodgood v. Ayres*, 108 N. Y. 400, 2 Am. St. 443; *Lybe App.* 106 Pa. St. 626, 51 Am. Rep. 542; *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. 746; *Willow C. Co. v. Michaelson*, 21 Utah, 248, 81 Am. St. 687; *Wheeler v. Jacobs*, 70 Vt. 162, 67 Am. St. 659, 43 L. R. A. 105; and water on the surface; *Stanislaus Co. v. Bachman*, 152 Cal. 716.

6. *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 10 L. R. A. N. S. 452. Trees and their fruits are realty. *Warvelle, Real Prop.* (3d ed.) 36.

thereto, the space above⁷ the soil, and certain interests⁸ in any or all of these.

Personal Property is all property that is not real property,⁹ being synonymous with chattels¹⁰ and *choses*.¹¹ While a good definition is expected to tell what the word defined is rather than what it is not, a few legal terms are so comprehensive that they cannot be defined concisely, but would require a definition so long and complex as to be confusing and uncertain, and the most satisfactory way to define them is to exclude what is not embraced therein. Personal Property is one of these terms; so Real Property is defined first, which can be done con-

7. "The law regards the empty space as if it were solid, inseparable from the soil." *Butler v. Frontier Co.*, 186 N. Y. 486, 116 Am. St. 563, 11 L. R. A. N. S. 920. In this case it was held that ejectment would lie to secure the removal of wire over land though its supports were not on the plaintiff's tract.

Shooting over the land of another is a trespass. *Whittaker v. Stangrick*, 100 Minn. 386, 117 Am. St. 709, 10 L. R. A. N. S. 921. That easements of light and air are really a purchase of the space above the soil, see *Re Brick Ch.* 4 Bradf. Surr. 503, 511.

8. Thus, easements are real property. *Stanislaus Co. v. Bachman*, 152 Cal. 716, 858; *Bates v. Hall* (Colo. 1908), 98 Pac. 3; *Foot v. Marggraf*, 233 Ill. 48. "The law of easements relates exclusively to land, and cannot be applied to chattels." *Mayo v. Newhoff*, 47 N. J. Eq. 31.

9. *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729; *Andrews v. Schoppe*, 84 Me. 170. In wills "personal property" may be used in a restricted sense, meaning tangible property only.

10. *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. 285, 40 L. R. A. 506; *Com. v. Hazelwood*, 84 Ky. 681; *State v. Bartlett*, 55 Mo. 200; *State v. Harvey*, 131 Mo. 339; *Fling v. Goodall*, 40 N. H. 208; *International Co. v. Haight*, 35 N. J. L. 279; *People v. Maloney*, 1 Park. Cr. 593; *State v. Langford*, 55 S. Car. 322, 74 Am. St. 746; *State v. Brown*, 68 Tenn. (9 Baxt.) 53, 40 Am. Rep. 81; *Re Gay's Gold*, 80 U. S. 353, 20 L. ed. 606; *Kendall v. Kendall*, 4 Russ. 360; 2 Blacks. Comm. 335.

The word "chattel" is derived from the Latin word *catella*, which primarily signified beasts of husbandry or cattle, of which personal property chiefly consisted in ancient times. Blacks. Comm. 385.

11. *Vawter v. Griffin*, 40 Ind. 593. The word "chose" (pronounced *shose*) is a French word, meaning "thing." 1 Andrews, Am. Law (2d ed.) 89.

cisely, and then it is said that Personal Property embraces all property not Real.

A tract of land is in the form of an inverted pyramid whose apex is at the center of the earth and whose base is at the surface. Real property, however, does not end with the surface, but extends upwards indefinitely to the heavens, its boundaries ever widening as the distance increases. The legal maxim is, "*Cujus est solum, ejus est usque ad coelum et ad inferos*" (he who owns the soil owns it to the sky and to the center of the earth.)¹²

§ 3. Distinctions between Realty and Personality. The leading distinctions between real and personal property relate to mobility, duration,¹³ the formalities required for transfer, and devolution in event of the owner dying intestate.

Real property, theoretically,¹⁴ and in most cases actually, is immovable and permanent; while personal property, on the other hand, theoretically,¹⁵ and in most cases actually, is movable and temporary. Thus a tract of land remains in the same place, and, so far as human life is concerned, remains there indefinitely; while a horse can be taken to any part of the earth's surface, and, as a

12. 2 Blacks. Comm. 18; 3 Blacks. Comm. 217; Co. Litt. lib. cap. 1, §§ 1, 4a; Pennsylvania Co. v. Neel, 54 Pa. St. 66; Pence v. Carney, 53 W. Va. 296, 6 L. R. A. N. S. 266.

13. 2 Blacks. Comm. 385.

14. If the key to a building is real property, as frequently is stated by the courts (see *post*, § 13), it certainly cannot be claimed that it is immovable; and every easement is not perpetual.

15. If a leasehold is personal property, as held by the courts (see *post*, § 9), it is not movable; Titusville App. 77 Pa. St. 103; and it may be perpetual. Delhi v. Everett, 52 Mich. 314; Blackmore v. Boardman, 28 Mo. 420; Van Rensselaer v. Hays, 19 N. Y. 68; Northern Bank v. Roosa, 13 Ohio, 334; Wallace v. Harmstad, 44 Pa. St. 492; White v. Fuller, 38 Vt. 193; Sadlier v. Biggs, 27 Eng. L. & Eq. 74.

An annuity to a man and his heirs is perpetual. Huston v. Read, 32 N. J. Eq. 591; Bradhurst v. Bradhurst, 1 Paige, 331; Yates v. Maddan, 16 Sim. 612, 39 Eng. ch. 612.

horse, must cease to exist sometime. Personal property is governed by the law of the domicile¹⁶ of its owner, by a fiction of law attending his person wherever he goes. The legal maxims¹⁷ are, "*Mobilia non habent situm*" (movables have no situs) and "*Mobilia personam sequuntur, immobilia situm*" (movable things follow the person, immovables their site or locality). Thus, if a debt be owing by one person to another, such debt is transitory, that is, suit can be brought by the creditor in any state where he finds the debtor;¹⁸ as, such debt being property in the hands of the creditor, he is presumed to carry it with him wherever he goes,¹⁹ and, hence, can enforce it whenever opportunity offers.

Unless the rule has been changed by statute, real property must be conveyed by an instrument under seal,²⁰ and contracts relating thereto must be evidenced in writing;²¹ while a contract transferring personal property not only need not be under seal, but, in many cases, personalty may be transferred by oral contract.

16. *Schmidt v. Perkins*, 74 N. J. L. 785, 122 Am. St. 417; *McGrew v. Mutual Co.*, 132 Cal. 85, 84 Am. St. 20; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Douglass v. Phenix Co.*, 138 N. Y. 209, 34 Am. St. 448; *Hornthall v. Burwell*, 109 N. Car. 10, 26 Am. St. 556, 13 L. R. A. 740.

Many judges have yielded to this doctrine with extreme reluctance; *Murray v. Charleston*, 96 U. S. 432; and it will not be applied where it contravenes the policy of the state where the property is. *Oliver v. Townes*, 14 La. (2 Mart. N. S.) 93; *Mahorner v. Hooe*, 17 Miss. 247, 48 Am. Dec. 706; *Schmidt v. Perkins* (N. J., 1907), 11 L. R. A. N. S. 1007; *Moye v. May*, 43 N. Car. 131.

17. *Kinney*, Law Dict. 466.

18. *East. Tenn. Co. v. Kennedy*, 83 Ala. 462, 3 Am. St. 755; *Gregg v. Union Co.*, 48 Mo. App. 494; *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190; *Hutchinson v. Ward*, 192 N. Y. 375; *Whitlow v. Nashville Co.*, 114 Tenn. 344, 68 L. R. A. 503; *Andrew's Stephen's Plead.* (2d ed.) 378.

19. *Fenton v. Edwards*, 126 Cal. 43, 77 Am. St. 141; *Augusta v. Dunbar*, 50 Ga. 387; *Consolidated Co. v. Collier*, 143 Ill. 259, 39 Am. St. 181; *Andrews v. Schoppe*, 84 Me. 170.

20. *Warvelle*, Real Prop. (3d ed.), 331.

21. *Anson. Contr.* *54.

Upon the death of the owner of real and of personal property, the devolution of the former is governed by the laws of the state where the property is situated; if the owner died without a will, it descends at once to his heirs;²² and, at common law,²³ could not be taken for the payment of debts. Personal property, however, generally is disposed of under the laws of the state where the decedent had his domicile;²⁴ and his will, if valid where he was domiciled, passes personal property in another state.²⁵ If he did not leave a will, his personal property passes to an administrator to be distributed ultimately among the decedent's next of kin, according to the law of his domicile.

As in the case of most distinctions in a classification, it is easy to see the distinctions in extreme instances, but as we approach the dividing line, the boundaries between real and personal property are scarcely distinguishable.²⁶ It is well settled, however, that shares of stock in a corporation,²⁷ or in a joint stock association,²⁸ are personal property, though the assets of the corporation or of the association may consist of real property; nor is a legacy²⁹ real property, though payable out of the proceeds of land.

§ 4. Relative Importance of Personalty and Realty. In former centuries real property was of vastly more importance than personal property, the latter being re-

22. Warvelle, *Real Prop.* (3d ed.), 169.

23. Rood, *Wills*, 55, § 96.

24. Rood, *Wills*, 265, § 409.

25. *Cross v. United S. Co.*, 131 N. Y. 330, 27 Am. St. 597, 15 L. R. A. 606.

26. *Brewster v. Hill*, 1 N. H. 350, *Lawson, Cas. Pers. Prop.*, 29.

27. *Johns v. Johns*, 1 Ohio St. 350, 356. See, also, *McDougald v. Hepburn*, 5 Fla. 568, 574. In some states there are statutory provisions to this effect. *Union B'k v. Byram*, 131 Ill. 92.

28. *Re Jones*, 172 N. Y. 575, 60 L. R. A. 476.

29. *Richmond v. Milne's Ex'rs*, 37 La. (17 La.) 312, 36 Am. Dec. 613.

garded as a transient commodity, concerning which our ancestors entertained a low and contemptuous opinion. Its amount was comparatively trifling, owing to the scarcity of money and the ignorance of luxuries, and such property consisted chiefly of household furniture, agricultural implements, live stock, and small stocks in trade. Hence it was that the rate of taxation on personal property in those days, sometimes ten per cent. or more—a rate which would alarm the modern property-holder,—was received with unconcern;³⁰ and a forfeiture of all of a man's chattels for misbehaviour was not as severe as it seems at the present time.³¹ In later years, however, the extension of trade and commerce and of the credit system, and the enormous growth of corporations have augmented the quantity, kinds, and value of personal property, until now it is of vastly more value than real property, and, hence, of greater importance. The idea of wealth in modern times is not associated with landed interests as it was formerly.

§ 5. **Classifications of Personalty.** Personal property is subject to two classifications. Designated as Chattels, the first classification, based upon the inherent nature of property, is into Chattels Real and Chattels Personal.³² Designated as Choses, the second classification, based upon the nature of the possession of property, is into Choses in Possession and Choses in Action.³³

Chattels Real consist of such kinds of real property as, for most purposes, possess the characteristics and incidents of personal property, and of such articles of personal property as, for most purposes, possess the characteristics and incidents of real property.

30. 2 Blacks. Comm. 284.

31. 2 Blacks. Comm. 385.

32. 2 Blacks. Comm. 386.

33. *Magee v. Toland*, 8 Port. 36. "All personal things are either in possession or in action. The law knows no *tertium quid* between the two." *Colonial Bank v. Whinney*, 30 Ch. D. 285.

Chattels Personal consist of such kinds of personal property as are not chattels real, constituting the greater portion of personal property, and being almost unlimited in variety.

A Chose in Possession is an article of tangible personal property which is under the immediate control of the person having ownership of it.

Choses in Action consist of all kinds of personal property not choses in possession.³⁴

These divisions will be made the subjects of subsequent chapters, except chattels personal, which do not require special treatment as they constitute the greater part of personal property.

§ 6. **Change from One Class to the Other.** As all personal property originally came from the realty, it follows that realty can be changed into personalty, and personalty into realty. The taking of minerals from the ground and the severing of vegetable products from the soil are some of the many ways by which realty is changed into personalty; while the erection of a building is a very common method of changing personalty into realty, the building material being personal property prior to annexation to the soil.

§ 7. **Goods—Wares — Merchandise — Effects—Commodities—Credits.** There are several words having a comprehensive meaning which are used in contracts, in wills, and in statutes, to designate property, some of which will be noted here. Each of these terms has a primary meaning; but the context may indicate an intention to restrict or to enlarge it; and, frequently, two or more of these terms are joined.

34. "The task of defining the term choses in action is not only difficult but impossible." Warren, Choses, 7. Choses in action "include various kinds of property so different from one another in their nature and incidents that they have little else in common but the name which characterizes them all by the one fact of their being property not in actual possession." Warren, Choses, 18.

The word "goods" refers to personal property, and does not include land.¹ The term is not as broad as personal property,² including inanimate objects only.³ The word "wares" means something to be sold,⁴ being equivalent to "merchandise,"⁵ which primarily means whatever usually is bought and sold in trade or market or by merchants, being objects of commerce.⁶ The

1. *Habley v. Patterson*, 47 Ala. 271; *Bailey v. Duncan's Ex'x*, 18 Ky. 20; *Faris v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; *Hunter v. Case*, 20 Vt. 195.

2. *Pearce v. Augusta*, 37 Ga. 597; *Chicago Co. v. Thompson*, 19 Ill. 578; *Curtis v. Phillips*, 5 Mich. 112; *Smith v. Wilcox*, 24 N. Y. 353, 32 Am. Dec. 302; *Crichton v. Symes*, 3 Atk. 61, 26 Eng. Reprint, 338.

In some cases "goods" might mean all kinds of tangible personal property; *Knapp v. McCaffrey*, 178 Ill. 107, 69 Am. St. 290; and embrace coin; *The Elizabeth & Jane*, 2 Mason 407; or include shares of stock in a corporation. *Tisdale v. Harris*, 37 Mass. 9, *Lawson, Cas. on Pers. Prop.* 368. The term "goods" might be used as equivalent to personal property, and include baggage; *Chamberlain v. Western Co.*, 44 N. Y. 305, 4 Am. Rep. 681; especially when used in contradistinction to real property. *Knapp v. McCaffrey*, 178 Ill. 107, 69 Am. St. 290; *Thompson v. Chauvenau*, 19 La. (7 Mart. N. S.) 331, 18 Am. Dec. 246; *Curtis v. Phillips*, 5 Mich. 112; *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107. In bequests, the term "goods" might comprise all the decedent's personal estate. *Dowdell v. Hamm*, 2 Watts, 61; *Kendall v. Kendall*, 4 Russ. Eng. Ch. 360.

3. *St. Jo. Co. v. Wilson*, 133 Ind. 465; *Vagun v. Murfreesborough*, 96 N. Car. 317, 60 Am. Rep. 413; *Knapp v. North W. Co.*, 11 Montg. Co. 119. Horses are not "goods;" *Ex parte Leland*, 1 Nott & McC. 460, 462; nor are dogs; *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. 285, 40 L. R. A. 508; though in some cases "goods" might include animals. *Pilcher v. Faircloth*, 135 Ala. 311; *Eddy v. Davis*, 35 Vt. 247.

4. *Passaic Co. v. Hoffman*, 3 Daly, 495. The word "wares" would not include a delivery wagon and the horses and harness used in connection therewith. *Van Patten v. Leonard*, 55 Iowa, 520.

5. *Com. v. Keller*, 9 Pa. Co. 253.

6. *Blackwood v. Cutting Co.*, 76 Cal. 212, 9 Am. St. 199; *Wynne v. Eastman*, 165 Ga. 614; *Kent v. Liverpool Co.*, 26 Ind. 294, 39 Am. Dec. 463; *Rohlf v. Kasemeier* (Iowa, 1908), 118 N. W. 276; *State v. Holmes*, 79 La. (28 La. Ann.) 765, 26 Am. Rep. 110; *Burgess v. New Eng. Co.*, 92 Mass. 221; *Hein v. O'Connor* (Tex.), 15 S. W. 414; *U. S. v. One Horse*, 22 Vt. 655, 27 Fed. Cas. 315. "Merchandise" does

phrase "goods, wares and merchandise" is more comprehensive than any of these terms used alone,⁷ meaning articles of personal property which are the subject of common barter and sale.⁸

The word "commodities" includes everything bought and sold.⁹ The term "effects" is more comprehensive than goods.¹⁰ Credit is the correlative term to

not include notes, bills of exchange and checks. *Indiana Co. v. Ogle*, 22 Ind. App. 593, 72 Am. St. 326. The term might have a broader meaning; *Hartwell v. California Co.*, 84 Me. 524; and include shares of stock in a corporation. *Tisdale v. Harris*, 37 Mass. 9.

7. *State v. Brooks*, 4 Conn. 446.

8. *Yohe v. Robertson*, 2 Whart. 155. In this case lottery-tickets were held to be "goods, wares and merchandise."

The expression "goods, wares and merchandise" has been held to include shares of corporate stock; *Ayres v. French*, 41 Conn. 142; *Banta v. Chicago*, 172 Ill. 204, 40 L. R. A. 611; *Colvin v. Williams*, 3 Harr. & J. 38, 5 Am. Dec. 417; *Boardman v. Cutter*, 128 Mass. 388; *Bernhardt v. Walls*, 29 Mo. App. 206; *Ellison v. Brigham*, 38 Vt. 64; music; *Comm. v. Nax*, 54 Va. (13 Gratt.) 789; and newspapers; *Smith v. Wilcox*, 24 N. Y. 353; but not promissory notes; *Whittemore v. Gibbs*, 24 N. H. 484; checks; *Beers v. Crowell*, Dudley, 28; money deposited in a bank; *Boston Co. v. Boston*, 158 Mass. 461; nor pleasure-yachts. *The Conqueror*, 166 U. S. 110, 41 L. ed. 937. "Goods, wares and merchandise" might be used as an equivalent to personal property. *Greenwood v. Law*, 55 N. J. L. 168, 19 L. R. A. 688.

9. *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259; *State v. Henke*, 19 Mo. 225; *Queen Co. v. State*, 86 Tex. 250, 22 L. R. A. 483. Cotton is a commodity; *State v. Borroum*, 23 Miss. 477; so are canned oysters; *Barataria Co. v. Jouliau*, 80 Miss. 555; and wine-plants. *Best v. Bauder*, 29 How. Pr. 489.

In Iowa and Massachusetts a very comprehensive sense is given to the word "commodity," as including privileges, conveniences, profits, gains, and advantage; *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. 479; *Portland B'k v. Apthorp*, 12 Mass. 252; *Hamilton Co. v. Massachusetts* 73 U. S. 632, 18 L. ed. 904; but it does not include labor. *Rohlf v. Kasemeier* (1908), 23 L. R. A. N. S. 1284.

10. *Union B'k v. Byram*, 131 Ill. 92; *Re Reimer's Est.*, 159 Pa. St. 212; *Welsh v. Parish* (S. Car.), 1 Hill, 155; *Arthur v. Morgan*, 112 U. S. 495, 28 L. ed. 825; *Campbell v. Prescott*, 15 Ves. 500.

The term "effects" embraces ships; *The Alpena*, 7 Fed. 361, 362; shares of stock; *Illinois Co. v. Long*, 41 Ill. App. 333; bills of exchange; *State v. Newell*, 1 Mo. 248; and might cover all personal property; *Galloway v. Galloway* (App. D. C. 1908), 36 Wash. Law

debt;¹¹ and "credits" consist of every claim or demand due or to become due, for money, for labor or for any other valuable thing.¹²

Rep. 734; but generally does not include land; *Mercer v. Lee*, 106 Iowa, 303; *De Cordova v. Knowles*, 37 Tex. 19; *Hunter v. Case*, 20 Vt. 195; *Haw v. Earles*, 15 Mees. & W. 450, 456; though it might do so if such were the intention. *Rood, Wills*, 335, § 502; *Page v. Foust*, 89 N. Car. 447.

11. *Wilde v. Mahaney*, 183 Mass. 455, 62 L. R. A. 813; *Isabelle v. Le Blanc*, 68 N. H. 409; *Libbey v. Hopkins*, 104 U. S. 303, 26 L. ed. 769. "Credit" is derived from the Latin, *credere*, meaning "to trust." *Lucas v. People*, 75 Ill. App. 662.

12. *Sellars v. Barrett*, 185 Ill. 466; *Wasson v. First B'k*, 107 Ind. 206; *Manning v. Spry*, 121 Iowa, 191; *State v. Georgia Co.*, 112 N. Car. 34, 19 L. R. A. 485; *Fayette County v. Peoples' B'k*, 47 Ohio St. 503, 10 L. R. A. 196. "Credits" includes loans; *Myers v. Seaberger*, 45 Ohio St. 232; and promissory notes; *Deering v. Richardson-Kimball Co.*, 109 Cal. 73; *Moore v. Hewitt*, 147 Ind. 464; but not money; *Pullman B'k v. Manring*, 18 Wash. 250; nor shares of corporate stock. *Dutton v. Citizens B'k*, 53 Kans. 440; *Niles v. Shaw*, 50 Ohio St. 370; *Commercial B'k v. Chambers*, 21 Utah, 324, 56 L. R. A. 346; *New Orleans Ass'n v. Wiltz*, 10 Fed. 330. In *Bressler v. Wayne County*, 25 Neb. 468, shares in a national bank were held to be "credits." "Credits" does not include legacies; *Barnes v. Treat*, 7 Mass. 271; nor land fraudulently conveyed. *Hunter v. Case*, 20 Vt. 195. "Credits" might have a broader meaning in a will. *Brandon v. Yeakle*, 66 Ark. 377.

CHAPTER II.

CHATELS REAL.

§ 8. **Nature and Kinds.** Chattels Real are of an "amphibious" nature,¹ being on the border line between realty and personalty, sometimes being designated as "mixed" property, and generally are lacking in mobility² which characterizes personal property in general. They are classed with personal property because they possess the other characteristic of personal property—that of limited existence.³

They are of three kinds—leaseholds,⁴ fixtures,⁵ and heirlooms. These will be noticed in order.

§ 9. **Leaseholds.** A leasehold is an interest in lands which is less than a freehold. The contract creating such interest is known as a lease; the parties are the landlord or lessor and the tenant or lessee, the latter being the owner of the interest created, and the former retaining a reversion in the land. The verb designating the action taken in making a lease is "demise;" and the consideration for the use of the land is called "rent."

1. 2 Blacks. Comm. 383.

2. 2 Blacks. Comm. 386.

3. 2 Blacks. Comm. 387.

4. *Flannery v. Rohrmayer*, 49 Conn. 27; *Imperial Co. v. Chicago Board*, 238 Ill. 100; *Ware v. Washington*, 14 Miss. 737; *Bank v. Dow*, 41 Hun, 13; *Brown v. Beecher*, 120 Pa. St. 590; *Joseph Spedel Co. v. Stark*, 62 W. Va. 512; 2 Blacks. Comm. 386; *Warvelle, Real Prop.* (3d ed.) 91. Accrued rent, not yet due, is a chattel real. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312.

5. *Tarabino v. Nicoll*, 5 Colo. App. 545; *Cross v. Weare Co.*, 153 Ill. 499, 49 Am. St. 902; *Mayo v. Newhoff*, 47 N. J. Eq. 31. See, also, *McCall v. Walter*, 71 Ga. 287.

Centuries ago in England, when the common law was in process of evolution, all persons of any consequence were landed proprietors, and land was considered as the most important possession. Under the law in force at that time land could not be conveyed, and leases were made with the exclusive view of aiding great land-holders in the cultivation of the soil. A lease did not pass any interest in the land itself, being merely a contract, for a breach of which the lessee could recover damages only from the lessor by a personal action. As customs altered and the lessee was given an interest in the land itself, the original idea that his rights were personal only, attached to his temporary and limited estate in the land, and such interest was treated as personal property. As the length of the terms increased gradually, the courts continued to apply the same rules to the longer terms as originally had been applied to a term for one year,⁶ so that, at common law, we have the absurd position that a man ninety years old in ill health, who has an interest in land for the rest of his life, however brief it may be, is a land owner, while a person having a lease of the same land for nine hundred and ninety-nine⁷ years, and who could not possibly outlive his term, is not a land

6. *Brewster v. Hill*, 1 N. H. 350, *Lawson, Cas. on Pera. Prop.* 29.

7. The question frequently is as asked why leases are given for ninety-nine or for nine hundred and ninety-nine years instead of for one hundred or for one thousand years; but it cannot be answered satisfactorily. Undoubtedly it is now the result of custom; but the origin of the custom is uncertain. It is said that during the reign of Elizabeth expressions antagonistic to leases for one hundred or for one thousand years, came from the chancery courts, and that a year was dropped from terms subsequently created, in order that they might not be within the letter of the criticisms of the court. It may be that our ancestors were influenced by the belief that "there's luck in odd numbers;" or, more probably, the dropping of one figure made the term seem shorter and the parties feel that they were not negotiating as to matters so far in the future—somewhat on the principle that a person is willing to pay ninety-nine cents for an article when one dollar would have seemed beyond his purse.

owner, and his estate is less than a freehold.⁸ This has been remedied by statute in some states.⁹

While a leasehold is, as a matter of law, personal property, it is as a matter of fact, real estate;¹⁰ and as such interests are treated fully in works on real property,¹¹ the subject will not be discussed any further here.

§ 10. **Fixtures—Definition—Nature.** A fixture is something tangible annexed to land, or in close juxtaposition or adapted thereto, or used in connection therewith, concerning which, a question may arise, between those having conflicting interests, whether it possesses the incidents and characteristics of real or of personal property. The *status* of "fixtures" is indeterminate, the word being ambiguous,¹² and it is a matter of extreme difficulty, in many cases, to determine whether the characteristics of realty or of personalty predominate. Fixtures are designated as chattels real,¹³ being either something which is a part of the land but may be treated as personal property, such as shelving and counters placed by a tenant in a store; or some article of personal

8. *Goodwin v. Goodwin*, 33 Conn. 314. A ninety-nine year lease renewable forever, is a chattel. *Oliver v. Jones*, 3 Ohio N. P. 129. A lease passes to the administrator; *Keating v. Condon*, 68 Pa. St. 75; and is sold on execution as personal property. *Buhl v. Kenyon*, 11 Mich. 249, 83 Am. Dec. 738; *Van Zile*, Illus. Cas. on Pers. 3; *Kille v. Giebner*, 114 Pa. St. 381. Dower will not be allowed in a ninety-nine year lease though renewable forever. *Spangler v. Stanler*, 1 Md. Ch. 36. A lease need not be recorded as real property. *Joseph Spidel Co. v. Stark*, 62 W. Va. 512.

9. See *Washington Co. v. D. C.*, 15 D. C. (4 Mackey) 416; *Knapp v. Jones*, 38 Ill. App. 489, *aff'd* 143 Ill. 375.

10. *Imperial Co. v. Chicago B'd*, 238 Ill. 100; *Bank v. Dow*, 41 Hun, 13. See, also, *Drinkhouse v. Spring V. W. W.*, 80 Cal. 308; *Titusville Works' App.*, 77 Pa. St. 103. Accrued rent not yet due passes to a grantee of the land. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312.

11. See *Warvelle*, *Real Prop.* (3d ed.) 91.

12. *Bagley v. Columbus Co.*, 98 Ga. 626, 58 Am. St. 325, 34 L. R. A. 286; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Ex parte D'Eresby*, 44 L. T. Rep. 781.

13. *Newhoff v. Mayo*, 48 N. J. Eq. 619.

property which is necessary for the complete enjoyment of land and appropriated thereto, such as a key to a house.

Any article firmly annexed to the soil is real property while so annexed, although the right to remove it may exist in someone who does not own the soil.¹⁴ On the other hand, an article not actually connected with the soil in any way, but being annexed constructively only,¹⁵ is personal property. The word "fixtures" is used by the courts without much precision. An article annexed to the soil frequently is designated as a "chattel," when, strictly speaking, what is meant is that it possesses the nature and incidents of a chattel,¹⁶ that is, someone not the owner of the soil, has the right to disannex it and convert it into personal property; and, while such legal right exists, it is governed by the rules which apply to personal property.

§ 11. Fixtures—Classification. Fixtures may be divided into artificial and natural fixtures, the former being such as are the work of man, and the latter being such additions to the soil as are made under the laws of nature, including all vegetable growths.

Fixtures may be classified also into removable and irremovable or permanent,¹⁷ the former being such as

14. This point is maintained by the courts when the question has been passed upon directly. *Ewell*, *Fixt.* (2d ed.) 122; *Johnston v. Philadelphia Co.*, 129 Ala. 515, 87 Am. St. 75; *Donnelly v. Thieben*, 9 Ill. App. 495; *Lawson v. Barlow Co.*, 21 Ky. Law Rep. 308; *Guthrie v. Jones*, 108 Mass. 191; *Hilton Co. v. Murray* (N. Y.), 47 App. Div. 239; *State v. Helmes*, 27 N. Car. 364; *Orient Co. v. Parlin-Orendorff Co.*, 14 Tex. Civ. App. 512; *Blanchard v. Bowers*, 67 Vt. 403; *Cooper v. Cleghorn*, 50 Wis. 113; *Lee v. Risdon*, 7 Taunt. 188.

15. This is shown conclusively by the fact that replevin and not ejectment is the only remedy for its recovery when improperly withheld.

16. See *Fish v. Capwell*, 18 R. I. 667.

17. *McCall v. Walter*, 71 Ga. 237. Some authors designate these classes as "chattel" fixtures and "real" fixtures.

are regarded in law as chattels distinct from the land; while an irremovable fixture is one which is treated as a part of the land. The words "removable" and "irremovable" do not refer to the difficulty in disannexing a fixture, and the classification does not apply where there are no conflicting interests, as an irremovable fixture may be removed by the person owning both the soil and the fixture and having the right to the immediate possession of it.

There are other designations given to particular classes of fixtures, either indicating the purpose for which they were annexed or the use to which they are put, such as trade fixtures, domestic fixtures, gas-fixtures, bar-fixtures, agricultural fixtures, useful fixtures, ornamental fixtures; or the place in which they are annexed, such as store fixtures, yard fixtures; or the person by whom they were annexed, such as landlord's fixtures, tenant's fixtures, and the like; but the meaning of these expressions is so self-evident as not to require explanation.

§ 12. **Fixtures—Tests—Intention.** There is no absolute test or criterion which can be applied to any and every set of facts to determine definitely whether a fixture is removable or irremovable; but each case should be decided according to the circumstances.¹⁸ There is no doubt that intention is pre-eminent¹⁹ in deciding the question; but it must be understood that the word "intention" is used here in its legal sense, meaning not a secret, inchoate, mental invention, but what others are

In opinions by the courts, the words "removable" and "irremovable" usually are omitted, the context indicating which is meant. An article frequently is said by the courts to be a "fixture," meaning that it is irremovable or removable as the case may be.

18. *Shoemaker v. Simpson*, 16 Kans. 43, 3 Cent. Law Jour. 132; *Hill v. Bullock* [1897], 2 Ch. 482, 66 L. J. Ch. 705, 77 L. T. 240, 46 W. R. 84. See, also, *Hudson Inst. v. Carr-Curran Co.*, 58 N. J. Eq. 59.

19. *Ewell, Fict.* (2d ed.) 20.

justified in supposing to have been the intention from what has been said and done.²⁰ If the parties prior²¹ to the annexation have made an express agreement in regard to the right of removal, there is no doubt as to the intention and it will be enforced accordingly unless the rights of third persons without notice have intervened,²² or it is against the policy of the law.²³ In many cases an agreement may be implied from the circumstances,²⁴ from the relation of the parties, or from usage.²⁵ Thus a prior agreement may be inferred from subsequent recognition²⁶ of rights which could result only from the existence of such an agreement; as by one party endeavoring to buy the fixtures. However important the matter of intention may be in determining whether an article is a part of the realty, a chattel does not become a part of the realty by mere intention alone without any action.²⁷

§ 13. **Fixtures—Tests—Annexation.** There are several secondary tests which are applied in determining

20. *State B'k v. Hoskins*, 130 Iowa, 339, 8 L. R. A. N. S. 376; *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780; *Snedeker v. Warring*, 12 N. Y. 170, *Lawson, Cas. on Pers. Prop.* 112; *Ewell, Firt.* (2d ed.) 56.

21. *Ewell, Firt.* (2d ed.) 109; *Gibbs v. Esty*, 81 Mass. 587, 1 Gray, *Cas. on Prop.* 749.

22. *Camp v. Thatcher Co.*, 75 Conn. 165; *First B'k v. Adam*, 138 Ill. 483; *Bringhoff v. Manzenmaier*, 20 Iowa, 513; *Hathaway v. Davis*, 32 Kans. 693; *Zabriskie v. Greater Am. Co.* (Neb. 1903), 93 N. W. 958; *Brennan v. Whitaker*, 15 Ohio St. 446, 1 Gray, *Cas. on Prop.* 751; *Lanigan v. Kille*, 97 Pa. St. 120; *Hilton Co. v. Murray* (N. Y.), 47 App. Div. 289; *Roffey v. Henderson*, 17 Q. B. 574, 21 L. J. N. S. Q. B. 49, 16 Jur. 84.

23. *Havens v. Germania Co.*, 123 Mo. 403, 45 Am. St. 570.

24. *Ewell, Firt.* (2d ed.) 111; *Gough v. Wood* [1894], 1 Q. B. 713.

25. *Clark v. Banks*, 6 Houst. 584; *Harris v. Gregg* (N. Y.), 17 App. Div. 210; *Stultz v. Dicker*, 5 Binn. 285; *Keogh v. Daniell*, 12 Wis. 163; *Van Ness v. Pacard*, 27 U. S. 137, 1 Gray, *Cas. on Prop.* 717; *Caldecott v. Smythies*, 7 C. & P. 308.

26. *Ewell, Firt.* (2d ed.) 115.

27. *Ewell, Firt.* (2d ed.) 53; *Williamson v. New Jer. Co.*, 29 N. J. Eq. 311, 1 Gray, *Cas. on Prop.* 768.

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the question of intention, such as annexation, adaptation, the amount of injury which would be occasioned by removal, relative value, and others. While annexation alone does not determine the question whether a fixture is removable, the degree of annexation is indicative, in many cases, of the intention in annexing it.¹ As a general rule, where there is no agreement, the more firmly anything is annexed, the greater the presumption that the person making the annexation intended that it should be permanent. Thus, while there is a presumption that a building is irremovable,² buildings resting upon posts have been treated as chattels. However, the degree of annexation must be governed by the nature of the article and the purpose or use which is to be made thereof. Thus, doors are considered annexed although they might be lifted off their hinges with ease. Still other articles which are ponderous enough to remain in place by their own weight³ have been regarded as sufficiently annexed by gravity; but it must not be supposed that every ponderous article becomes irremovable merely because of its weight, even though it may sink into the earth⁴ as a result thereof; nor does the size alone⁵ of an article make

1. Ewell, *Fixt.* (2d ed.) 145.

2. Ewell, *Fixt.* (2d ed.) 102.

3. *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Brigham v. Overstreet*, 123 Ga. 447, 10 L. R. A. N. S. 452; *Leonard v. Stickney*, 131 Mass. 541. As a statute; *Snedeker v. Warring*, 12 N. Y. 170, *Lawson, Cas. on Pers. Prop.* 112; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, 36 L. J. N. S. Ch. 107, 15 W. R. 186; a rail-fence; *Mitchell v. Billingsley*, 17 Ala. 391; *Bagley v. Columbus Co.*, 98 Ga. 626, 58 Am. St. 325, 34 L. R. A. 286; *Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556; *Boon v. Orr*, 4 Greene, 304; *Emrich v. Ireland*, 55 Miss. 390; *Hannibal Co. v. Crawford*, 68 Mo. 80, 82; *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray, *Cas. on Prop.* 651; *State v. Graves*, 74 N. Car. 396; *Kimball v. Adams*, 52 Wis. 554; and a church-organ; *Chapman v. Union Co.*, 4 Ill. App. 29, 10 Cent. Law Jour. 99.

4. *Crerar v. Daniels*, 109 Ill. App. 654.

5. *Kimball v. Grand Lodge*, 131 Mass. 59; *Roddy v. Brick*, 42 N. J. Eq. 218; *White v. Arndt*, 1 Whart. 94, 1 Gray, *Cas. on Prop.* 723; *New York Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229.

it a part of the realty. As a general rule, some degree of fixation is required;⁶ thus, tools,⁷ although intended for permanent use where located and necessary to make an establishment complete, are removable. On the other hand, articles may be annexed and yet be removable; as where machines,⁸ or opera-chairs,⁹ are bolted to the floor or otherwise fastened for the sole purpose of better use by keeping them steady.

Many articles, necessary or very useful to the complete enjoyment of land, are treated as a part of the realty by a fiction of law known as "constructive annexation."¹⁰ Such are the keys¹¹ to a house; and articles temporarily,¹² accidentally,¹³ or unlawfully¹⁴ severed, but the rolling-stock¹⁵ of a railway is not regarded as a part of the realty, in most states. In some states its *status* is fixed by constitutional or statutory provisions.

§ 14. **Fixtures—Tests—Injury from Removal.** If the damage and injury occasioned by the removal of an article would be great, either to the freehold¹ or to the arti-

6. *Noble v. Sylvester*, 42 Vt. 146, 1 Gray, Cas. on Prop. 758.

7. *Wolford v. Baxter*, 33 Minn. 12, 53 Am. Rep. 1; *Oliver v. Lansing*, 59 Nebr. 219; *Knickerbocker Co. v. Penn Co.* (N. J. 1904), 58 Atl. 409.

8. *Ewell, Fixt.* (2d ed.) 441.

9. *Andrews v. Chandler*, 27 Ill. App. 103.

10. *Ewell, Fixt.* (2d ed.) 45.

11. *Wystow's Case*, 14 Hen. 8, 25 b., 4 Man. & Ry. 280, n. (g).

12. *Ewell, Fixt.* (2d ed.) 456; as when making repairs. *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

13. *Ewell, Fixt.* (2d ed.) 62; as by fire; *Guernsey v. Phinisy*, 113 Ga. 398, 84 Am. St. 270; decay; *Bainway v. Cobb*, 99 Mass. 457; or wind. *Rogers v. Gillinger*, 30 Pa. St. 185, 72 Am. Dec. 694, 1 Gray, Cas. on Prop. 733.

14. As trees cut down by a trespasser. *Frank v. Magee*, 100 La. (49 La. Ann.) 1250, 1254, 101 La. (50 La. Ann.) 1066, 1069.

15. *Ewell, Fixt.* (2d ed.) 50.

1. *Ewell, Fixt.* (2d ed.) 107.

ele² itself, it might lead to the conclusion that the person placing it there intended it to be permanent; but the mere fact that an article must be taken to pieces³ to remove it, does not affect the question; nor is the fact that removal could be made without injury decisive that it is removable.⁴

§ 15. **Fixtures—Tests—Adaptation.** Adaptation⁵ or appropriation to the realty is a factor in ascertaining the intention. There would be a stronger presumption that an organ in a church edifice was a part of the building if the church had been erected with a view to accommodating that particular organ,⁶ than if the facts were otherwise.

§ 16. **Fixtures—Tests—Duration of Interest in Land.** Where the one annexing an article has only a temporary⁷ interest in the land, that is a very potent factor in

2. *Collamore v. Gillis*, 149 Mass. 578, 14 Am. St. 460, 5 L. R. A. 150; *Fish v. New York Co.*, 29 N. J. Eq. 16; *Ford v. Cobb*, 20 N. Y. 344.

3. *Baker v. McClurg*, 96 Ill. App. 165, *aff'd* 198 Ill. 28, 92 Am. St. 261, 59 L. R. A. 131; *Park v. Baker*, 89 Mass. 78, 83 Am. Dec. 668; *Walker v. Schindel*, 58 Md. 360; *Fullam v. Stearns*, 30 Vt. 443.

4. *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Detroit R'y v. Board* (Mich. 1904), 98 N. W. 979; *Heldegger v. Atlantic Co.*, 16 Mo. App. 327; *Hart v. Sheldon*, 34 Hun. 38; *Johnson v. Willinghamby*, 3 Tenn. Cas. (Shannon) 338; *Homestead Co. v. Becker*, 96 Wis. 206; *Lawton v. Salmon*, 3 Atk. 16, n, 1 H. Bl. 259, n, 1 Gray, Cas. on Prop. 664; *Knox v. Brotherton*, 14 N. S. Wales, 185.

5. *Ewell, Fixt.* (2d ed.) 27. No doubt adaptation had much to do in leading the courts to adopt the fiction of constructive annexation mentioned in § 13, *ante*.

6. *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 399.

7. *Ingalls v. St. Paul Co.*, 39 Minn. 479, 12 Am. St. 676; *Holmes v. Standard Co.* (N. J. Ch. 1903), 55 Atl. 1107; *Cullers v. James*, 66 Tex. 494. By reason of his temporary occupancy of the premises a tenant generally is considered as not intending to make his annexations permanent; *Ewell, Fixt.* (2d ed.) 135; though they may be annexed very firmly in some instances. On the other hand, one having a freehold interest in the land is presumed, on account of the unity of title in the soil and the article annexed, to have an

determining his intention. Thus, where drilling for oil required the frequent moving of derricks, boilers, engines and buildings, this was considered as showing that such erections were temporary;⁸ on the other hand, where a corporation was formed for fifty years to conduct "a wood working business, to buy lands and to erect thereon buildings for manufacturing purposes, and machinery necessary and incident thereto," it was held to indicate that the annexation of machinery by such corporation was intended to be permanent.⁹

§ 17. Fixtures—Tests—Relative Value of Articles. The relative value¹⁰ of articles with reference to the land to which they are annexed, has some influence in deciding whether such articles are irremovable or not. Thus where a tenant for sixty days, annexed property worth over five thousand dollars, the court considered that an intention to remove was shown, and the fixtures, consequently, were held to be removable¹¹ by him.

§ 18. Fixtures—Landlord and Tenant. The question as to the right to remove fixtures arises in a great variety of instances,¹² a few of which will be noticed. A

intention to make his annexations a permanent accession to the realty; *Ewell, Fixt.* (2d ed.) 263; for he is improving his own property.

8. *Mellon v. Allegheny County*, 3 Pa. Dist. 422.

9. *Lee v. Hubschmidt Co.*, 55 N. J. Eq. 623.

10. *Hewitt v. General Co.*, 164 Ill. 420; *Green B. Co. v. Ireland*, 77 Iowa, 636; *McDonald v. Shepard*, 25 Kans. 112; *Bank of Louisville v. Baumeister*, 87 Ky. 6; *Ross v. Zuntz*, 87 La. (36 La. Ann.) 888; *Brown v. Baldwin*, 121 Mo. 126; *Shannon v. Gore Co.*, 2 U. C. App. 396.

11. *Wright v. Macdonnell*, 88 Tex. 140, rev'g (Civ. App. 1894) 27 S. W. 1024.

12. The question most frequently arises between landlord and tenant, licensor and licensee, grantor and grantee, co-tenants, mortgagor and mortgagee, different sets of mortgagees, lienor and lienee, devisee and executor, widow and heir and personal representative of her deceased husband as to dower and homestead, heir and executor or legatee, tenant *pur autre vie* and the remainderman or reversioner

lessee is the most favored¹³ of all, the law, in order to favor trade and to encourage industry,¹⁴ being very liberal in allowing him to remove fixtures placed by him on the demised premises, and he has the right to remove trade-fixtures, such as steam-engines,¹⁵ machinery,¹⁶

personal representative of the life tenant and the remainderman or reversioner, debtor and creditor, different sets of creditors including cases of conditional sales of goods, disfeisor and disfeisee, the government and the tax-payer, insurer and insured, litigants as to the jurisdiction of courts or whether the statute of limitations has run or whether the statute of frauds is a defense, in condemnation proceedings, and in many criminal cases, such as arson, burglary, embezzlement, and larceny.

13. *Ewell, Fixt.* (2d ed.) 138.

14. *Ewell, Fixt.* (2d ed.) 134. The tendency of the courts is to become more liberal with each succeeding year. The former rigid rules in regard to fixtures being part and parcel of the land, resulted, first, from the great importance originally attached to land as compared to personalty, the land-owner being a favorite with the judges who, in many cases, were the sons, brothers, nephews or uncles of the landed proprietors, with prospects of inheritance; and, secondly, from the policy of keeping landed interests in a few hands. All the ancient decisions aimed toward concentrating and keeping a large estate in one person. Originally, land could not be conveyed, but must descend upon the death of the owner; and, when it descended, it went to one alone as heir. When land ultimately did reach two or more persons, the doctrine of joint tenancy brought the land in time back into the hands of one person alone. The courts gradually learned that land could be divided not only by perpendicular lines, but by horizontal ones, as in the case of mineral veins; but they have had more difficulty in getting over the idea that division lines always must be approximately straight ones. It took time for the courts to recognize that an irregular line might run into one person's building around one or more parts thereof, and that what was included within that line was really belonging to someone else; when justice required this to be done, the courts resorted to the fiction that what was included within the irregular line might be personal property, and tried to discover rigid tests whether it might be realty or personalty, instead of applying common sense and justice to the case.

15. *Updegraff v. Lesem*, 15 Colo. App. 297; *Baker v. McClurg*, 96 Ill. App. 165; *Gordon v. Miller*, 28 Ind. App. 612; *Conrad v. Saginaw Co.*, 54 Mich. 249, 52 Am. Rep. 817; *Torrey v. Burnett*, 38 N. J. L. 457, 20 Am. Rep. 421; *Conde v. Lee*, 15 App. Div. 401, *aff'd* 171 N. Y. 662.

16. *Reynolds v. Shuler*, 5 Cow. 323.

shelving,¹⁷ counters,¹⁸ and a great variety of other articles,¹⁹ even including buildings²⁰ although very substantially annexed.²¹ However, the right to remove fixtures has not extended to other tenants than those engaged in trade, though the courts are not strict in determining what is a trade.²² An inn-keeper²³ is held to exercise a trade; but farming²⁴ is not a trade, nor is operating a railroad.²⁵ Where a tenant has the right to remove fixtures, they can be mortgaged²⁶ or sold²⁷ by him, or taken on execution.²⁸

§ 19. Fixtures—When Tenant Has No Right of Removal. However, there are some limitations on the right to remove even trade-fixtures. Thus if the tenant surrender possession of the premises, leaving his trade-fixtures on the premises without any agreement regarding their subsequent removal, they become the property of the landlord and are not removable by the tenant, unless

17. *Roth v. Collins*, 109 Iowa, 501; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. 467; *Cubbins v. Ayres*, 72 Tenn. 329; *Josslyn v. McCabe*, 46 Wis. 591, 18 Am. Law Reg. 711; *Argles v. McMath*, 26 Ont. 224, aff'd 23 Ont. App. 44; *Orr v. Davis*, 17 N. Zeal. 106.

18. *Guthrie v. Jones*, 108 Mass. 191.

19. See *Ewell. Fixt.* (2d ed.) 139 *et seq.*, notes.

20. *Ewell, Fixt.* (2d ed.) 152.

21. *Antoni v. Belknap*, 102 Mass. 193; *Belvin v. Raleigh Co.*, 123 N. Car. 138; *Van Ness v. Pacard*, 27 U. S. 137, 1 Gray, Cas. on Prop. 717.

22. *Ewell, Fixt.* (2d ed.) 157.

23. *Ombony v. Jones*, 19 N. Y. 234; *Gray v. McLennan*, 3 Man. 337.

24. *Ewell, Fixt.* (2d ed.) 158; *Elwes v. Maw*, 3 East, 38, 1 Gray, Cas. on Prop. 666, 2 Smith, Lead. Cas. 239.

25. *Western Co. v. State* (Ga. Spec. Com. 1881), 14 L. R. A. 438.

26. 1 *Cobbey, Mort.* 247, § 202.

27. *Ewell, Fixt.* (2d ed.) 139.

28. *Ewell, Fixt.* (2d ed.) 544; 1 *Freeman, Exec.* 455, § 114.

the landlord wrongfully,²⁹ or by legal process,¹ has prevented such removal, in which case the rights of the tenant are not affected. If the landlord re-enter to enforce a forfeiture,² or if the tenant wrongfully refuse to give up possession³ of the premises when he should, the tenant's right of removal is lost.

At common law, when a tenant takes a renewal of his lease, without any agreement in regard to the removal of fixtures placed in the premises by him during his tenancy, his right to remove such fixtures is gone,⁴ although he would have had the right to remove them had he done so before taking the renewal. The theory is that, by not removing them at the termination of his first lease, they became the property of the landlord under the principle mentioned above; and the new lease is presumed to be a lease of the land including the fixtures

29. *Updegraff v. Lesem*, 15 Colo. App. 297; *Raymond v. Strickland*, 124 Ga. 504, 3 L. R. A. N. S. 69; *Smusch v. Kohn*, 49 N. Y. Supp. 176, 178, 22 Misc. 344; *Watts v. Lehman*, 107 Pa. St. 106, 16 Pitts. Leg. J. 78, 21 Cent. Law J. 369; *Bermea Co. v. Adoue*, 20 Tex. Civ. App. 655; *Young v. Consolidated Co.*, 23 Utah, 586; *Waterman v. Clark*, 58 Vt. 601; *Argles v. McMath*, 23 Ont. 44.

1. Such as an injunction. *Ewell, Fixt.* (2d ed.) 202.

2. *Ewell, Fixt.* (2d ed.) 210; as for non-payment of rent. *Morey v. Hoyt*, 62 Conn. 542, 552, 19 L. R. A. 611; *Pendil v. Maas*, 87 Mich. 215.

3. *Dreiske v. People's Co.*, 107 Ill. App. 285; *Baker v. McInturff*, 49 Mo. App. 505; *Samson v. Rose*, 65 N. Y. 411; *Kelly v. Webber*, 11 Ir. C. L. 57.

4. *Ewell, Fixt.* (2d ed.) 254; *Wadman v. Burke*, 147 Cal. 351, 1 L. R. A. N. S. 1192; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509, 25 Am. Law Reg. 21, 1 Lawson, Cas. on Pers. Prop. 155; *Uns v. Price*, 22 Ky. Law Rep. 791; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. 467; *Watriss v. First B'k*, 124 Mass. 571, 26 Am. Rep. 694, 18 Alb. Law J. 351, 7 Cent. Law J. 206, 1 Gray, Cas. on Prop. 780; *Champ Co. v. Roth Co.*, 103 Mo. App. 103; *Gerbert v. Trustees*, 59 N. J. L. 160; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Cook v. Scheld* (Super. 1880), 4 Wkly. Cin. Law Bul. 1123, 8 Am. Law Rec. 493; *Hertzberg v. Witte*, 23 Tex. Civ. App. 320; *Spencer v. Commercial Co.*, 30 Wash. 520; *Sharp v. Milligan*, 23 Beav. 419, 5 W. R. 336; *Orr v. Davis*, 17 N. Zeal. 106.

which have become an irremovable part thereof. This rule, being very unjust and unreasonable,⁵ has been changed by statute in many states.

Fixtures substituted⁶ by a tenant for fixtures received by him from the landlord, are not removable, but must be left on the premises.

§ 20. Fixtures—When Tenancy Uncertain. If the duration of the tenancy be uncertain, as in the case of a tenancy at will, the tenant's right of removal continues for a reasonable time after the termination of the tenancy.⁷

§ 21. Fixtures—Landlord Cannot Remove—Distress. When questions arise between landlord and tenant as to the right of the landlord to remove his own fixtures from the demised premises, the tenant again is favored, such fixtures being regarded as irremovable, and the tenant is held to be entitled to the use of the premises with the fixtures which were thereon, not only at the time of the demise,⁸ but to those subsequently⁹ placed thereon; nor

5. The rule is repudiated in *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, 17 Am. Law Reg. 638, 13 Am. Law Rev. 378; *Second B'k v. Merrill Co.*, 69 Wis. 501. In *Ogden v. Garrison* (Neb. 1908), 117 N. W. 714, Epperson, Comm'r., ironically remarks that by failure to reserve his own property upon renewal of a lease, the tenant conclusively is presumed to have presented it to his landlord. See, also, *Union Co. v. Wilmar Co.*, 116 Iowa, 392; *Wittenmeyer v. Board*, 11 Ohio C. C. 119, 2 Ohio Dec. 555, 6 Ohio Circ. Dec. 258; *Radey v. McCurdy*, 209 Pa. St. 306, 103 Am. St. 1009, 67 L. R. A. 179.

6. *Squire v. Portland* (Me. 1909), 76 Atl. 679; *Ashby v. Ashby*, 59 N. J. Eq. 536; *Ex parte Hemenway*, 2 Lowell, 496, 498; *Richardson v. Ranney*, 2 U. C. C. P. 460; *Cosby v. Shaw*, L. R. 23 Ir. 181, varying L. R. 19 Ir. 307.

7. *Ewell*, *Fixt.* (2d ed.) 212.

8. *Townsend v. Ford* (N. Y.), 72 App. Div. 621; *Edwards v. Perkins*, 7 Ore. 149; *Emery v. Fugina*, 68 Wis. 505; *Cameron v. Tarratt*, 1 U. C. Q. B. 312; *Sachs v. Henderson* [1902], 1 K. B. 612, 71 L. J. K. B. 392, 86 L. T. R. 437, 50 W. R. 418.

9. *Wright v. Macdonnell*, 88 Tex. 140; as where the lessor rebuilds after destruction by fire. *Rogers v. Snow*, 118 Mass. 118.

can the landlord distrain¹⁰ fixtures placed on the premises by the tenant.

§ 22. **Fixtures—Licensor and Licensee.** The law is liberal in allowing a licensee to remove fixtures placed by him upon the land, he having, like a tenant whose tenancy is of uncertain duration, a reasonable time¹¹ to remove them after the revocation of his license.

§ 23. **Fixtures—Transfers of Land—Seizure on Execution.** In most other relations than those above mentioned, the rule generally is quite strict that whatever is annexed to the land is to be treated as realty and irremovable, the legal maxim being, *quicquid plantatur solo, solo cedit* (whatever is affixed to the soil becomes a part of it.) Thus, upon a sale of land, the purchaser usually is entitled to the fixtures thereon,¹² unless he has notice,¹³ at the time of the sale, that they belong to others; and it does not make any difference whether the transfer is voluntary or involuntary.¹⁴ A devisee,¹⁵ likewise, is favored; and the rule is the same where the transfer is by operation of law.¹⁶

Fixtures which the law treats as part of the land cannot be levied¹⁷ upon as personal property by a creditor.

§ 24. **Fixtures—Co-Tenants—Taxation—Insurance—Lienor and Lienee—Life Tenants.** The strict rule that

10. *First B'k v. Adam*, 138 Ill. 483; *Vausse v. Russell*, 2 McCord, 329; *Howell v. Listonville Co.*, 13 Ont. 476; *Year Books (Eng. 1504)*, 20 Hen. VII, 13 b (1505), 21 Hen. VII, 26 b.

11. *Ewell, Fxt.* (2d ed.) 214.

12. *Ewell, Fxt.* (2d ed.) 387.

13. *Ewell, Fxt.* (2d ed.) 478.

14. The purchaser of land at an execution sale is entitled to the fixtures upon the premises. *Ewell, Fxt.* (2d ed.) 402.

15. *Burdick v. Chesebrough* (N. Y.), 94 App. Div. 532; *Colegrove v. Dias Santos*, 2 B. & C. 76, 3 D. & R. 255.

16. An heir takes such fixtures as a purchaser would have taken. *Ewell, Fxt.* (2d ed.) 308.

17. *Ewell, Fxt.* (2d ed.) 537.

all annexations belong to the landowner if made without his consent, is applied between those owning land jointly, as to erections made on such land by one without the consent of the other, the erections becoming the joint¹⁸ property to the same extent as the land to which they are annexed.

The inclination to regard fixtures as irremovable obtains also when the question arises between the government and the tax-payer;¹⁹ or between the insurer and the insured.²⁰ Generally, when a lien attaches to land, it covers whatever is annexed to the land at the time²¹ the lien attaches, or which subsequently is annexed by third persons. Upon the death of a tenant for life, fixtures placed by him,²² or by third persons,²³ upon the land, pass to the remainderman or to the reversioner; as the duration of the estate of a life tenant raises the presumption that he was improving his own property for his own benefit²⁴ and intended the annexations to be permanent.

§ 25. Fixtures—Trespassers. There are three instances in which the rights of parties are involved by annexations made to the soil by a trespasser. First, where a

18. Ewell, *Fixt.* (2d ed.) 92.

19. *People v. Waldron* (N. Y.), 26 App. Div. 527; *Dundee v. Carmichael*, 39 Scot. Law Rep. 573.

20. See *Comercial Co. v. Allen*, 80 Ala. 571; *Niagara Co. v. Heenan*, 181 Ill. 575; *West v. Farmers' Co.*, 117 Iowa, 147; *British A. Co. v. Bradford*, 60 Kans. 82; *Havens v. Germania Co.*, 123 Mo. 403, 45 Am. St. 570; *Caraher v. Royal Co.*, 63 Hun (70 N. Y. Supr.) 82; *Orient Co. v. Parlin-Orendorff Co.*, 14 Tex. Civ. App. 512; *Thurston v. Union Co.*, 17 Fed. 127, 28 Alb. Law Jour. 490; *Carr v. Fire Ass'n*, 14 Ont. 487.

21. Ewell, *Fixt.* (2d ed.) 423.

22. *Schimpf v. Rhodenwald*, 62 Neb. 105; *Haflick v. Stober*, 11 Ohio St. 482; *McCullough v. Irvine's Ex'rs*, 13 Pa. St. 438; *Brooks v. Brooks*, 12 S. Car. 422; *Cannon v. Hare*, 1 Tenn. Ch. 22; *Petre v. Ferrers* (Eng. 1891), *Wkly. Notes*, 171.

23. As in the case of a grantee. *Pickett v. Polk*, 74 Ala. 122.

24. *Merritt v. Scott*, 81 N. Car. 385.

person takes his own materials and affixes them to the land of another without the knowledge or consent of the latter; second, where a person takes the materials of another, and affixes them to the land of a third without the knowledge or consent of either; third, where a landowner affixes to his own land, the materials of another without the knowledge or consent of the latter.

In the first case—where annexations have been made to the soil of another (*alieno solo*) by a stranger or trespasser, or by a disseisor, with his own materials, the courts are inclined to be very strict about enforcing the rule that whatever is affixed to the soil becomes a part thereof,¹ he being presumed to have intended it as a gift to the landowner. The common law does not make any distinction between a willful² trespasser, and one acting in good faith,³ or even under a mistake.⁴ though a court of equity, in a meritorious case, will allow compensation on the ground that it would be a fraud for the owner of land to avail himself of such improvements without making some compensation.⁵ The matter has been regulated, to some extent, by statutes denominated "betterment," "improvement," or "occupying claimant" laws enacted to remedy the harshness of this common law rule.

In the two other cases—where the owner of the materials is the injured party, there is no room for the pre-

1. Ewell, *Fixt.* (2d ed.) 86.

2. *Prescott Co. v. Rouse*, 3 *Ariz.* 317; *Merrell v. Legrand*, 2 *Miss.* 150; *Gillespie v. Moon*, 2 *Johns. Ch.* 585, 1 *N. Y. Ch.* 500, 7 *Am. Dec.* 559; *Malone v. State*, 79 *Tenn.* 701.

3. *Hereford v. Pusch* (*Ariz.* 1902), 68 *Pac.* 547; *Graham v. Roark*, 23 *Ark.* 19; *Blair v. Worley*, 2 *Ill.* 178; *Dutton v. Ensley*, 21 *Ind. App.* 46, 69 *Am. St.* 340; *Burleson v. Teeple*, 2 *Greene*, 542; *Brandser v. Mjageto*, 79 *Minn.* 457; *Rotan Co. v. Dowlin* (*Tex. Civ. App.* 1903), 77 *S. W.* 430; *Kimball v. Adams*, 52 *Wis.* 554; *Masefield v. Rotana*, 10 *N. Zeal.* 169.

4. Ewell, *Fixt.* (2d ed.) 92.

5. 3 *Pomeroy, Eq. Juris.* (3d ed.) 2480, § 1241.

sumption of a gift to the landowner of such materials, the owner of such materials being ignorant of the fact that they have been taken from his possession until after the trespass has been committed. He cannot be presumed to have consented to an act of which he was ignorant; and can follow and recover his materials unless their identity has been lost.⁶ The word "identity" here, however, does not mean that the former owner must be unable to recognize them, but that their legal identity as chattels must be lost. Thus, if brick, belonging to one person, should be erected into a building on the land of another without any contract express or implied on the part of the owner of the brick, the owner of the brick might be able without difficulty to recognize the brick, yet their identity, in the eyes of the law, has been lost, they not being any longer brick but the walls of a building;⁷ but if the matter never is adjusted, and the erection afterwards is torn down, so that the brick are restored to original condition, the former owner would be entitled to them.⁸

§ 26. **Fixtures in Criminal Cases.** In criminal cases, the accused being favored, an article will be treated as a part of the realty or not as circumstances may conduce to that end. In larceny the inclination of the courts is to regard articles actually annexed, as realty,⁹ as larceny

6. Ewell, *Fixt.* (2d ed.) 81.

7. Ewell, *Fixt.* (2d ed.) 83; *Woodruff W'ks v. Adams*, 37 Conn. 233; *Strubbee v. Cincinnati R'y*, 78 Ky. 481; *Detroit Co. v. Busch*, 43 Mich. 571.

Undoubtedly the owner of the brick would have a right of action against the trespasser for his tort; or the trespasser might be liable upon a *quasi* contract. *Thweat v. Stamps*, 67 Ala. 96, 98.

8. See *Larson v. Furlong*, 63 Wis. 323.

9. *Langston v. State*, 96 Ala. 44; *State v. Hall*, 5 Harr. 492; *Blackburn v. Clark*, 19 Ky. Law Rep. 659; *State v. Davis*, 73 La. (22 La. Ann.) 77; *Wing v. Wing*, 66 Me. 62; *State v. Graves*, 74 N. Car. 396; *Bell v. State*, 51 Tenn. 426; *Comfort v. Fulton*, 39 Barb. 56, 13 Abb. Pr. 376; *U. S. v. Smith*, 1 Cranch C. C. 314;

cannot be committed of realty, removing fixtures therefrom being regarded as a trespass only, which is not so serious an offense; though larceny may be committed of articles only constructively¹⁰ annexed. Likewise, in burglary, what might be held to be a part of the realty in many instances, will not be so regarded in such cases; cupboards, lockers, and the like, when broken into, do not form a part of the house.¹¹ But the severe common law penalty of capital punishment for these crimes having been abolished, statutes now provide that many acts will constitute larceny,¹² or burglary, which would have been held to be trespasses only at common law.

§ 27. Fixtures—Natural. Natural fixtures may be vegetable, mineral, or animal products; but questions most frequently arise in regard to vegetable products. Vegetable products are either *fructus naturales* or *fructus industriales*,¹³ the former being spontaneous growths, as trees,¹⁴ and grass,¹⁵ which usually are treated as realty. *Fructus industriales* are those resulting from annual labor, such as all kinds of grain, flax, hops, melons, potatoes, and the like, in regard to which the courts are more liberal and treat them as personalty.¹⁶

§ 28. Fixtures—Emblements—What Are. The word “emblements,” in its strict sense, is applied to such

Regina v. Rice, 28 L. J. M. C. 64, 32 L. T. 323, Bell C. C. 87, 8 Cox C. C. 119, 7 W. R. 232, 5 Jur. N. S. 273; *Rex v. Dowsey*, 29 Vict. L. Rep. 453.

10. Ewell, *Fixt.* (2d ed.) 670.

11. Ewell, *Fixt.* (2d ed.) 676.

12. Ewell, *Fixt.* (2d ed.) 670.

13. Ewell, *Fixt.* (2d ed.) 335.

14. Warvelle, *Real Prop.* (3d ed.) 36; Nursery trees may be trade-fixtures. Ewell, *Fixt.* (2d ed.) 162.

15. *Evans v. Hardy*, 76 Ind. 527; *Evans v. Iglehart*, 6 Md. 171; *Rogers v. Elliott*, 59 N. H. 201, 47 Am. Rep. 172; *Re Chamberlain*, 140 N. Y. 390; *Reiff v. Reiff*, 64 Pa. St. 134, Van Zile, *Illus. Cas. in Personalty*, 5.

16. Ewell, *Fixt.* (2d ed.) 339.

crops as a tenant has the right to remove after the expiration of his tenancy; ¹⁷ but, in modern times, the word sometimes is used as being synonymous with "growing crops." In order that the right to emblements may exist, it is requisite that the crop shall be planted; ploughing and manuring is not enough. ¹⁸

§29. Fixtures—Emblements—Who Entitled to. Usually tenants whose terms are of uncertain ¹⁹ duration are allowed to harvest crops planted before the death of the person which terminated the tenancy; but the doctrine of emblements does not apply to crops sown by one own-

17. *Bagley v. Columbus Co.*, 98 Ga. 626, 58 Am. St. 325, 34 L. R. A. 236.

18. *Ewell, Fict.* (2d ed.) 357.

19. As a tenant at will; *Ewell, Fict.* (2d ed.) 358; a tenant *par autre vie*; *Ewell, Fict.* (2d ed.) 355; or the personal representative of a tenant for life; *Ewell, Fict.* (2d ed.) 354; and this right extends to lessees of such tenants (sub-tenants). *Dorsett v. Gray*, 98 Ind. 273; *Bevans v. Briscoe*, 4 Harr. & J. 139; *Edghill v. Mankhey* (Neb. 1907), 11 L. R. A. N. S. 688; *King v. Foscue*, 91 N. Car. 116; *Noble v. Tyler*, 61 Ohio St. 432, 48 L. R. A. 735.

The reason for this rule is that it is the presumed intention of all parties to regard them as removable, and for the encouragement of husbandry and for the public benefit resulting therefrom. *Ewell, Fict.* (2d ed.) 336. Sometimes it is said that emblements are treated as personal property as compensation for the labor and expense of tilling the soil. *Ewell, Fict.* (2d ed.) 335.

If the tenancy is certain, there is no right to emblements. *Thomas v. Noel*, 81 Ind. 382; *Wheeler v. Kirkendall*, 67 Iowa, 612; *Dircks v. Brant*, 56 Md. 500; *Smith v. Sprague*, 119 Mich. 148, 75 Am. St. 384; *Reeder v. Sayre*, 70 N. Y. 180; *Sandars v. Ellington*, 77 N. Car. 255; *Sharp v. Kinsman*, 18 S. Car. 108; *Hendrixson v. Cardwell*, 56 Tenn. (9 Baxt.) 389, 40 Am. Rep. 93, *Lawson Cas. on Pers. Prop.* 83; *Mason v. Moyers*, 41 Va. (2 Rob.) 606; *Kelly v. Todd*, 1 W. Va. 197; *Davies v. Connop*, 1 Price, 53. Nor is a tenant at sufferance entitled to emblements. *Miller v. Cheney*, 88 Ind. 466.

If a tenancy is forfeited by some act or default of the tenant, the rights of innocent third persons, such as purchasers and sub-lessees, to emblements, are not affected, although the tenant himself would not have been entitled to them. *Miller v. Havens*, 51 Mich. 482; *Gray v. Worst*, 129 Mo. 122; *Gregg v. Boyd*, 69 Hun (76 N. Y. Supr.) 583; *Russell v. Moore*, L. R. 8 Ir. 318.

ing land in fee simple, as against one acquiring the land by purchase.²⁰ A tenant having a right to emblements after the termination of his tenancy, has also the right of free entry, egress and regress,²¹ and cannot be regarded as a trespasser, provided he enters within a reasonable²² time, and exercises his rights reasonably.

§ 30. **Fixtures—Mineral Accessions.** Accessions to the earth which are not of vegetable origin, usually are treated as realty. Thus, where large masses of stone fell from a cliff to land below belonging to another person, such stones became a part of the soil of the person on whose land it rested.¹ Aerolites² belong to the owner of the soil on which they fall; and ice³ formed in a flowing stream, and attached to the soil, belongs to the person owning the land under the stream.

20. Ewell, *Fixt.* (2d ed.) 339. The word "purchase" is used here in its strict legal sense, meaning a transfer of title to land in any other method than by descent. Thus, while the personal representative of a deceased landowner would be entitled to the crops growing upon the land at the time of such landowner's death, as against the heir (Ewell, *Fixt.* 2d ed. 339), the personal representative would not be entitled to the crops as against a devisee (Ewell, *Fixt.* 2d ed. 350), as the devisee takes by "purchase" and is in the same position, in the eyes of the law, as one acquiring title by deed. The landowner plants his crops with a view to their ultimate severance, and, hence, they always are regarded by him in the nature of personal property. This idea the courts carry out, so far as his estate is concerned, in event of his death before harvest, provided he has not made other disposition of the land; but if he transfers title to the land, either by deed or by will, he is presumed to intend that the transferee shall take everything connected with the soil as a part of it; and the rule is the same if the transfer is involuntary (Ewell, *Fixt.* ed. ed. 341), or when land is recovered in ejectment. (Ewell, *Fixt.* 2d ed. 658.)

21. Ewell, *Fixt.* (2d ed.) 363.

22. *Lewis v. McNutt*, 65 N. Car. 63, 1 Gray, *Cas. on Prop.* 638.

1. *Dearden v. Evans*, 5 M. & W. 11.

2. *Goddard v. Winchell*, 86 Iowa, 71, 41 Am. St. 481, 31 Cent. L. J. 365, 17 L. R. A. 788, *Lawson, Cas. on Pers. Prop.* 23; *Maas v. Amana Soc.* (Iowa), *Chicago Tribune* of July 9, 1877, p. 2.

3. *Washington Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196, 33 Am. Rep. 255.

§ 31. **Fixtures—Accession from Animal Products.** Honey⁴ formed in a tree by wild bees, belongs to the owner of the land on which the tree stands.

The right to manure is governed by circumstances. The lessee of a farm cannot remove or dispose of manure made from the products of the farm⁵ even though such products belonged to the lessee.⁶ The rules of good husbandry require the manure to be expended on the farm, and to allow the lessee to remove it would impoverish the farm;⁷ but where the products are obtained elsewhere, as in the case of a livery-stable, the manure belongs to the lessee.⁸ As between a grantor and grantee of land, unless reserved in the deed, manure made in the ordinary course of husbandry passes with the land,⁹ even though in heaps;¹⁰ but it is otherwise as to manure not made in the ordinary course of husbandry, as where the grantor was a teamster.¹¹

§ 32. **Heir-loom.** An heir-loom¹² is some special article of personal property which, by custom, descends to

4. *Fisher v. Steward*, Smith, 60.

5. *Ewell*, *Fixt.* (2d ed.) 180; *Bonnell v. Allen*, 53 Ind. 130; *Lassell v. Reed*, 6 Me. 222, 1 Gray, Cas. on Prop. 642; *Daniels v. Pond*, 38 Mass. 367, 32 Am. Dec. 269, *Lawson*, Illus. Cas. in Pers. 90; *Sawyer v. Twiss*, 26 N. H. 345, 1 Gray, Cas. on Prop. 651; *Middlebrook v. Corwin*, 15 Wend. 169, 1 Gray, Cas. on Prop. 646; *Lewis v. Jones*, 17 Pa. St. 262. *Contra.* *Smithwick v. Ellison*, 24 N. Car. 326.

6. *Brigham v. Overstreet*, 128 Ga. 447, 10 L. R. A. N. S. 452; *Wetherbee v. Ellison*, 19 Vt. 379.

7. *Ewell*, *Fixt.* (2d ed.) 182.

8. *Gallagher v. Shipley*, 24 Md. 418; *Nason v. Tobey*, 182 Mass. 314, 94 Am. St. 659; *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333; *Carroll v. Newton*, 17 How. Pr. 189.

9. *Parsons v. Camp*, 11 Conn. 525; *Vehue v. Mosher*, 76 Me. 469, 20 Cent. Law J. 93; *Kittredge v. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Goodrich v. Jones* (N. Y.), 2 Hill, 142, 1 Gray, Cas. on Prop. 648; *Stone v. Proctor*, 2 D. Chipm. 108. *Contra.* *Ruckman v. Outwater*, 28 N. J. L. 581.

10. *Ewell*, *Fixt.* (2d ed.) 459; *Wetherbee v. Ellison*, 19 Vt. 379. See, however, *Collier v. Jenks*, 19 R. I. 137, 61 Am. St. 741.

11. *Ewell*, *Fixt.* (2d ed.) 460; *Proctor v. Gilson*, 49 N. H. 62.

12. An heir-loom is not a fixture, there being some distinctions between them. An heir-loom, in the strict and proper sense, is P. P.—3

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the heir instead of passing to the personal representative as in the case of chattels generally.¹³ Although the term is used colloquially in the United States,¹⁴ heir-looms never have existed in this country, and further reference to them is unnecessary. Even in England the tendency of the courts is to limit this class of property.

always some loose chattel not affixed to the land in any way; and while, in most cases, the heir inherits land at the same time he acquires the heir-loom, there is no reason why an article should not descend to the heir as an heir-loom without the existence of any land; a fixture, however, cannot exist except in connection with land. Nor is an heir-loom an appurtenance, not being essential to the enjoyment of the land.

13. 2 Blacks. Comm. 427.

14. Warvelle, Real Prop. (3d ed.) 50. See Ewell, Fixt. (2d ed.) §18, where the subject of "heir-looms" is treated at length.

CHAPTER III.

CHoses IN POSSESSION.

§ 33. **Classification—Animate and Inanimate.** Choses in Possession are of such great variety that only a few, concerning which the law has peculiar rules, will be noticed in this chapter. Choses in Possession may be classified into animate and inanimate.

§ 34. **Animals—Classification.** Animate choses, that is, animals, are of two kinds,¹ *domitae naturae*, or domestic² animals, and *ferae naturae*, or wild animals. Animals *domitae naturae*, or tame animals are those which from long association with the human race have lost their former wild nature.

Animals *domitae naturae* are subdivided, according to the purpose for which they are kept,³ into "useful" animals and those of a "base nature." Animals are designated as useful when they either are fit for food, as cattle and sheep, or are beasts of burden, as horses. Animals of a base nature are such as are kept for whim or pleasure, as cats⁴ and dogs.⁵

The common law regards and gives the greatest protection to those animals designated as "useful,"⁶ and

1. 2 Blacks. Comm. 390.

2. Domestic means "belonging to the house." *People v. Campbell*, 4 Park. Cr. 386. Sometimes domestic animals are designated as *mansuetae naturae*. *Van Leuven v. Lyke*, 1 N. Y. 515, *Lawson*, Illus. Cas. in Personalty, 46.

3. *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

4. *Whittingham v. Ideson*, 8 Up. Can. L. J. 14, *Pattee*, Illus. Cas. on Personalty, 48.

5. 4 Blacks. Comm. 236; *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. 235, 40 L. R. A. 508.

6. *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689.

the least protection to those *ferae naturae*. Useful animals are regarded as having intrinsic value, and are given the same protection as is given to goods;⁷ but, at common law, animals of a base nature are not regarded as property to the extent of being subjects of larceny,⁸ nor could a criminal action be brought for maliciously killing⁹ an animal of a base nature; though a civil action could be maintained for injuring¹⁰ or killing¹¹ one; and such an animal may be the subject of an action in trover.¹² Under statutes, however, a dog may be the subject of larceny,¹³ and a person may be punished for killing¹⁴ one. In some states dogs have been protected be-

7. *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 83, 1 Am. Rep. 94.

8. 4 Blacks. Comm. 236. Dogs are not the subject of larceny; *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31; *State v. Holder*, 81 N. Car. 527, 31 Am. Rep. 517; *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772; *Findlay v. Bear*, 8 Serg. & R. 571; nor is a coon; *Warren v. State*, 1 Greene, 106, *Pattee, Illus. Cas. on Personalty*, 38; nor a ferret; *Rex v. Searing*, Russ. & R. 350; nor a sable; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; nor doves; *Com. v. Chance*, 26 Mass. 15, 19 Am. Dec. 348, *Pattee, Illus. Cas. on Personalty*, 35.

Larceny at common law was punishable with death; and refusing to recognize animals of a base nature as property, prevented the sacrifice of a man for an animal. *People v. Maloney*, 1 Park. Cr. 593.

9. *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 562, *Pattee, Illus. Cas. on Personalty*, 41; *U. S. v. Gideon*, 1 Minn. 292 (Gil. 226); *State v. Marshall*, 13 Tex. 55.

10. *Uhlein v. Cromack*, 109 Mass. 273; *State v. Marshall*, 13 Tex. 55.

11. 4 Blacks. Comm. 236; *Louisville Co. v. Fitzpatrick*, 129 Ala. 322, 87 Am. St. Rep. 64; *Ten Hopen v. Walker*, 96 Mich. 236, 35 Am. Rep. 598; *Harper v. St. Paul Co.*, 99 Minn. 253, 6 L. R. A. N. S. 911; *Salley v. Manchester Co.*, 54 S. Car. 481, 71 Am. St. 810; *Citizens' Co. v. Dew*, 100 Tenn. 317, 66 Am. St. 754, 40 L. R. A. 518; *Whittingham v. Ideson*, 8 Up. Can. L. J. 14, *Pattee, Illus. Cas. on Personalty*, 48.

12. *Graham v. Smith*, 100 Ga. 434, 62 Am. St. 323, 40 L. R. A. 508.

13. *State v. Soward*, 83 Ark. 264, 11 L. R. A. N. S. 1117; *Hamby v. Samson*, 105 Iowa, 112, 67 Am. St. 285, 40 L. R. A. 508; *Mullaly v. People*, 86 N. Y. 365.

14. *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516.

cause they have been taxed,¹⁵ on the theory that what the law taxes as property is *prima facie* an article of value,¹⁶ and will be protected as such.¹⁷

Turkeys¹⁸ and peacocks¹⁹ are domestic animals; but bees,²⁰ doves,²¹ deer,²² coons,²³ and fish²⁴ are *ferae naturae*. Oysters are fish,²⁵ and, hence, *ferae naturae*.²⁶ It is not the disposition of the animal which fixes its place in the classification; for a dog, though *domitae naturae*, may be savage, while rabbits and doves,²⁷ though *ferae naturae*, are harmless.

§ 35. **Maritime Law.** The maritime law is that which governs navigation; and it is borrowed from the civil law. Although the common law was the law of England, the desirability of having the maritime law uniform resulted in the civil law being adopted as the law of admiralty in that country,¹ and, consequently, in this country. Under the Federal Constitution, Article I, §8, clause

15. *Com. v. Hazlewood*, 84 Ky. 681; *State v. Langford*, 55 S. Car. 322, 74 Am. St. 746; *State v. Brown*, 56 Tenn. (9 Baxt.) 53, 40 Am. Rep. 81.

16. *Kinsman v. State*, 77 Ind. 132.

17. *Salley v. Manchester Co.*, 54 S. Car. 481, 71 Am. St. 810.

18. *State v. Turner*, 66 N. Car. 618.

19. *Com. v. Beaman*, 74 Mass. 497.

20. 2 Blacks. Comm. 392; *State v. Murphy*, 8 Blackf. 498; *State v. Repp*, 104 Iowa, 305, 65 Am. St. 463; *Goff v. Kilts*, 15 Wend. 550, *Pattee*, Illus. Cas. on Personalty, 23; *Gillet v. Mason*, 7 Johns. 16, *Pattee*, Illus. Cas. on Personalty, 28 *Van Zile*, Illus. Cas. on Personalty, 36; *Wallis v. Mease*, 3 Binn. 546.

21. *Com. v. Chace*, 26 Mass. 15, 19 Am. Dec. 348, *Pattee*, Illus. Cas. on Personalty, 35.

22. *State v. Weber*, 205 Mo. 36, 46, 120 Am. St. 715.

23. *Warren v. State*, 1 Greene, 106, *Pattee*, Illus. Cas. on Personalty, 38.

24. *People v. Truckee Co.*, 116 Cal. 97, 58 Am. St. 183, 39 L. R. A. 581; *State v. Shaw*, 67 Ohio St. 157, 60 L. R. A. 481.

25. *Caswell v. Johnson*, 58 Me. 164.

26. *People v. Morrison*, 194 N. Y. 175, 128 Am. St. 552.

27. *Earl v. Van Alstine*, 8 Barb. 630, *Lawson*, Cas. on Pers. Prop. 39.

1. *Benedict*, Admir. (4th ed.) 2.

3, the Congress is given the power "To regulate commerce with foreign nations, and among the several states." This power is exclusive, that is, the states are forbidden to exercise it. Article III, §2, clause 1, provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."²

§ 36. **Ships—Definition.** A ship³ is a structure with decks, designed for transportation on water. The word is not so comprehensive as "boat" as the latter includes small, open craft as well as those which are intended to remain at one place more or less permanently by being anchored or otherwise fastened.⁴ The form and size, however, are not important, nor is the equipment or means of propulsion, whether propelled by wind, expansive gases, electricity, animals or human beings, but the purpose and business determine⁵ whether or not a structure is a ship.

§ 37. **Mariners.** The term "mariner"⁶ includes all persons employed on board during a voyage to promote its purposes. The master is the commander of a merchant-vessel, having chief charge of her government and navigation, with implied power to sell the vessel in case of necessity,⁷ providing he cannot communi-

2. Benedict, Admir. (4th ed.) 11.

3. The word "ship" is a general term; and, in law, is equivalent to "vessel." Benedict, Admir. (4th ed.) 121. In a restricted sense the word is used to indicate the hull and spars alone as distinguished from the rigging. Undoubtedly the largest article of tangible personal property in existence is the modern steamship.

4. A dry-dock is not a vessel. *Cope v. Vallette Co.*, 119 U. S. 629.

5. Benedict, Admir. (4th ed.) 122.

6. Benedict, Admir. (4th ed.) 149.

7. *Peck v. Nashville Co.*, 57 La. (6 La. Ann.) 148; *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782; *Pierce v. Ocean Co.*, 35 Mass. 83, 29 Am. Dec. 567; *Chambers v. Grantzon*, 7 Bosw. 414; *The Sarah Ann*, 2 Sumn. 206, aff'd 38 U. S. 400; *Ornage v. McKay*,

cate * with the owners. A "ship's husband" or ship's agent is the person appointed to manage it, usually being one of the part-owners. He has implied powers to order repairs, to provide supplies,⁹ to procure the crew, to take care of the vessel in port, to see that the necessary papers are secured, to make contracts¹⁰ for freight and to collect the same.

§ 38. Charter Parties—Wharfage—Demurrage—General Average—Jettisons. Maritime affairs in all countries have been considered as possessing a nature different from affairs on land. They are governed by their own courts of justice, codes of law, modes of administering them,¹¹ and have their own peculiar terms and expressions, some of which will be mentioned.

Chartering¹² a vessel is making a contract for hiring it for a voyage or for a portion of a voyage, such contract being called a "charter-party."¹³ Wharfage¹⁴ or Jockage is the name given to the pecuniary charge, in the nature of rent, for the use of a dock or wharf. Demur-

5 Nova Scotia, 444; Read v. Bonham, 3 B. & B. 147, 7 Eng. C. L. 384.

A case of necessity would exist if the ship was not in condition to proceed without repairs, and the master could not raise money to pay therefor. Past v. Jones, 60 U. S. 150; *Somes v. Sugrue*, 4 C. & P. 276, 19 Eng. C. L. 382.

8. *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Hall v. Franklin Co.*, 26 Mass. 466; *American Co. v. Center*, 4 Wend. 45; *The Amelie*, 73 U. S. 18.

9. *Gould v. Stanton*, 16 Conn. 12.

10. *Williamson v. Hine* [1891], 1 Ch. 390.

11. *Benedict, Admiralty*, (4th ed.) 1.

12. *Benedict, Admiralty*, (4th ed.) 158.

13. "Charter-party" is a corruption of *charta partita* (Latin, divided writing or card), the written contract formerly being cut from top to bottom, one part being delivered to each of the contracting parties, thus preventing counterfeiting.

A charter-party is distinguished from a bill of lading in that the former relates to the space occupied rather than to the goods carried, while a bill of lading relates primarily to the carriage of particular goods rather than to the part of the vessel in which they are carried.

14. *Benedict, Admiralty* (4th ed.) 161.

rage¹⁵ is an allowance for damage by the detention of a vessel, promptness being of the utmost importance in navigation.

General Average¹⁶ is apportionment, in maritime adventures, of a loss resulting from voluntary¹⁷ but necessary¹⁸ and successful¹⁹ sacrifice by the master or by someone representing²⁰ those interested, in imminent²¹ peril and for the general good.²²

A Jettison is throwing overboard any article or casting away masts or other parts. The master determines whether one is necessary, the heaviest and least valuable articles usually being sacrificed first. Jettisons of cargo, more frequently than anything else, give occasion for the application of the doctrine of general average.

§ 39. **Home and Foreign Ports.** If a vessel has more than one owner, its home-port is where the managing owner resides.²³ While in a foreign port, a merchant-vessel subjects itself to the law of that place,²⁴ unless otherwise provided by treaty;²⁵ but, by public comity, a public or government vessel does not.²⁶

15. Benedict, Admiralty (4th ed.) 163.

16. Benedict, Admr. (4th ed.) 175.

17. Slater v. Hayward Co., 26 Conn. 136; Emery v. Huntington, 109 Mass. 431, 12 Am. Rep. 725; Meech v. Robinson, 4 Whart. 360, 34 Am. Dec. 514; Hesbit v. Lushington, 4 T. R. 783.

18. Scudder v. Bradford, 31 Mass. 13, 25 Am. Dec. 355; The Gratitude, 3 C. Rob. 240.

19. Columbian Co. v. Ashby, 38 U. S. 338.

20. Walker v. United S. Co., 11 Serg. & R. 61, 14 Am. Dec. 610; Star of Hope, 76 U. S. 203; Mouse's Case, 12 Coke, 63.

21. British Co. v. Wilson, 132 Ind. 285; The Alcona, 9 Fed. 172; Harrison v. Australasia B'k, L. R. 7 Ex. 39.

22. The sacrifice must be for the good of those having community of interest. Whitteridge v. Norris, 6 Mass. 127; The J. P. Donaldson, 167 U. S. 599.

23. Olson v. San Francisco, 148 Cal. 80, 2 L. R. A. N. S. 197.

24. Benedict, Admiralty (4th ed.) 151; U. S. v. Diekelman, 92 U. S. 520; Regina v. Keyn, 2 Ex. D. 63.

25. Wildenhuis's Case, 120 U. S. 1.

26. In event of an infraction of the laws of a foreign country by a public vessel, the remedy is by complaining to the country to

§ 40. **Registry of American Vessels.** Vessels of the United States are those which have been built in this country, and belong wholly to citizens of this country, and which have been registered as required by act of Congress;²⁷ if coasting vessels, those which have been enrolled and licensed as such. Registration or enrollment is not compulsory, but is a privilege or advantage which the law offers to the owner of which he may avail himself if he choose,²⁸ and is made by the Collector whose district includes the port to which the vessel belongs.

§ 41. **Admiralty Courts—Jurisdiction.** The courts which have jurisdiction and power to try and determine all maritime cases are known as Admiralty Courts. In times of war an admiralty court which passes on questions relating to property captured at sea is known as a Prize Court.¹ In this country there are no courts which are merely admiralty courts;² the only courts having jurisdiction in admiralty cases are United States Courts, whose jurisdiction extends over navigable canals³ and rivers,⁴ the Great Lakes,⁵ and all public navigable waters.⁶

§ 42. **Admiralty Courts—Actions—Kinds.** Suits and proceedings in admiralty are divided into two general classes—*in rem*, and *in personam*.⁷ Suits *in rem* are

which the vessel belongs; or, in extreme cases, by expelling forcibly. *The Santissima*, 20 U. S. 283; *The Constitution*, 20 L. T. N. S. 219.

27. U. S. Rev. St. § 4131.

28. *Davidson v. Gorham*, 6 Cal. 343.

1. Benedict, Admiralty (4th ed.) 192.

2. Benedict, Admir. (4th ed.) 185.

3. *Ex parte Boyer*, 109 U. S. 629.

4. *Re Garnett*, 141 U. S. 1.

5. *The Genesee Chief*, 53 U. S. 443.

6. Benedict, Admir. (4th ed.) 127.

7. Benedict, Admir. (4th ed.). In a suit *in rem*, unless someone intervenes and assumes the responsibility of the controversy, the power and process of the court is confined to the thing itself, and does not reach either the person or the other property of its owner;

against a thing itself, and the relief sought is confined to the thing itself, and does not extend to any person. This proceeding is a remedy not afforded by the common law. Suits *in personam*, on the other hand, are against the person, and the relief is sought against him without reference to any specific property or thing.

§ 43. Admiralty Courts—Actions—Parties—Attorneys. The party complaining is called the libellant, corresponding to the plaintiff in a common law proceeding; and the other party, whether person or thing, is called generally the defendant. If a person defends in a suit *in rem*, he is called the claimant;⁸ in a suit *in personam*, the respondent.⁹ Attorneys in admiralty courts are called "proctors."¹⁰

§ 44. Admiralty Courts—Pleadings—Decree. Pleadings in admiralty are not so technical, precise, and accurate as in common law courts, the only requirement being that the cause of action shall be set forth plainly. The first proceeding is the libel¹¹ or information. The pleadings on the part of the defendant are the "claim," the "exception," and the "answer."¹² Inasmuch as everyone interested has constructive notice of a proceeding *in rem*, all the world is bound by the court's decree as to title, possession, sale, or forfeiture.

while in a suit *in personam* the court is confined to the rights and liabilities of the person, its execution proceeding against his property generally, without regard to its relation to the controversy.

8. His right to appear depends on his claiming the property or some interest therein.

9. Benedict, Admir. (4th ed.) 212.

10. From the Latin, *procurator*, an agent.

11. From the Latin *libellus* (a little book.) Benedict, Admir. (4th ed.) 213.

12. Benedict, Admir. (4th ed.) 264. The claim is confined to proceedings *in rem*. If the defendant finds on the libel itself that the libellant ought not to have the relief prayed for, or that the court does not have jurisdiction, instead of answering he may except in written exceptions.

§ 45. **Maritime Liens—Nature.** A maritime lien consists in the right to cause a sale in order to have a claim paid.¹ The master frequently is not of sufficient pecuniary ability to respond to the demands of the voyage; hence, the contracts and torts of the master, in numerous cases, are a lien upon the vessel itself. Maritime liens differ from common law liens in a very important point, namely, that possession is not required.² In order that a lien may arise from contract, the contract must be a maritime one³ and must be executed, that is, the ship must have received the benefit⁴ thereof. Maritime liens are given for reasonably⁵ necessary⁶ repairs and supplies,⁷ and for maritime torts,⁸ such as a collision,⁹ and for various other claims.

§ 46. **Maritime Liens—Priority—Salvage—Wages.** Generally, liens are compensated in the order in which they have contributed to the safety and preservation of the vessel, which may not be in order of time;¹⁰ if a later lien preserves a prior one, they will be discharged in the inverse order of their creation.¹¹ Maritime liens have

1. *The Young Mechanic*, 2 Curt. 404, 3 Ware, 85.

2. *Benedict, Admir.* (4th ed.) 106; *The Sabine*, 101 U. S. 334; *The Bold Buccleugh*, 7 Moore P. C. 267.

3. *People's Co. v. Beers*, 61 U. S. 393.

4. *The Pacific*, 1 Blatchf. 570.

5. *The Fortitude*, 3 Sumn. 228.

6. *The Aurora*, 14 U. S. 98.

7. *The Lulu*, 77 U. S. 192; Act of Cong. of June 23, 1910.

8. *The Stevens*, 170 U. S. 113.

9. *The Siren*, 74 U. S. 152; *Currie v. McKnight* (Eng. 1897), A. C. 97.

10. *The Madrid*, 40 Fed. 677. Liens for damages from collisions are entitled to priority in inverse order. *The America*, 168 Fed. 424; and a lien for tort has precedence over a lien for previous supplies. *The John G. Stevens*, 170 U. S. 113; as when a vessel continues in navigation, the lien-holder necessarily submits his interest to all maritime perils, including liability for torts. *The Frank G. Fowler*, 8 Fed. 331.

11. *The William T. Graves*, 14 Blatchf. 139.

preference over other liens.¹² The costs¹³ of the libellant are paid first, as the suit in a way preserves all liens.

Salvage¹⁴ is next to costs in priority, for, if the ship is lost, all liens are lost with it. Salvage is the compensation awarded to persons by whose voluntary service a ship or its lading has been saved, in whole or in part, from impending peril or recovered after actual loss.¹⁵ The amount¹⁶ of the reward is determined by the circumstances.¹⁷ It should not be so low as to remove the incentive¹⁸ to render service against apparent danger, nor so low as to encourage embezzlement.¹⁹ On the other hand, the award should not be so large as to cause vessels in peril to decline assistance.²⁰ The modern tendency is to award less than one-half.²¹ Next in priority to the lien for salvage is that for wages²² of sailors, who are guarded tenderly²³ by the courts and have been considered as wards of the admiralty.²⁴ Their wages, though comparatively small, are of very great importance to them; and are a lien upon the last plank of the ship.

§ 47. **Bottomry and Respondentia Loans.** Bottomry loans are those in which a sum of money is loaned for a particular voyage at maritime interest on the security of the ship, of the ship and freight, or of the ship, freight and cargo, on condition that if the voyage be performed

12. *The Lottawanna*, 88 U. S. 558.

13. *The Olga*, 32 Fed. 329.

14. *The Athenian*, 3 Fed. 248; *The Panthea*, 25 L. T. N. S. 339.

15. *Benedict*, Admir. (4th ed.) 170.

16. *Benedict*, Admir. (4th ed.) 171.

17. *Bond v. The Cora*, 2 Pet. Adm. 375; *The Ida Barton*, Young Adm. 240.

18. *Wilder's Co. v. The Lurline*, 11 Hawaii, 90; *Fisher v. The Sybil*, 5 Hughes, 61, aff'd 17 U. S. 98; *The Werra*, 12 P. D. 52.

19. *The Blackwall*, 77 U. S. 1.

20. *Ehrman v. Swiftsure*, 4 Fed. 463.

21. *Benedict*, Admir. (4th ed.) 172.

22. *The Davidson*, 9 Biss. 275; *The Sabina* (Eng.), 7 Jur. 132.

23. *The Sailor Prince*, 1 Ben. 461; *The John*, 3 C. Rob. 233.

24. *Benedict*, Admir. (4th ed.) 140.

safely the money and interest shall be paid; but if the ship does not so arrive, having been lost by a peril of the sea, nothing shall be paid.¹ The contract receives its name because the keel or bottom of the ship is used figuratively as representing all.² Respondentia³ bonds are those given to secure a similar loan made on the cargo instead of on the ship. Maritime interest is a high rate allowed because the contract is in the nature of insurance,⁴ the lender assuming the risk of entirely losing his money;⁵ though if the interest is clearly exorbitant the court may order it reduced; but this power is exercised with great caution.⁶

The owner of the subject matter can execute a bond any place and for any purposes;⁷ but the master, acting as the agent for the owner, unless he has express⁸ authority, can execute the contract only when the vessel is in a foreign⁹ port and he is destitute of funds,¹⁰ and necessity¹¹ requires it, and he must be unable to communicate¹² or hear¹³ from the owner, and must have

1. Benedict, Admir. (4th ed.) 164; *The Sophie Wilhelmine*, 58 Fed. 892; *The Empusa*, 5 Prob. Div. 6.

2. *The Atlas*, 2 Hagg. Adm. 53.

3. *Maitland v. The Atlantic*, Newb. Adm. 514. Bottomry and respondentia bonds may be embraced in one instrument.

4. *The Ann C. Pratt*, 1 Curt. 350.

5. *The Draco*, 2 Sumn. 157.

6. *The Hunter*, Ware, 249; *The Pontida*, 9 Prob. Div. 177.

7. *The Mary*, 1 Paine, 671.

8. *The Bonaparte*, 3 W. Rob. 393.

9. The several states of the United States are considered foreign to each other. *Burke v. The M. P. Rich*, 1 Cliff. 308.

10. *Thomas v. Osborne*, 60 U. S. 36.

11. *Ross v. The Active* (U. S.), 2 Wash. 226; *The Hersey*, 3 Hagg. Adm. 407. A bond given to procure repairs necessary to enable the ship to continue her voyage, would be valid.

12. *The Circassian*, 3 Ben. 398; *The Hamburgh*, 2 Moore P. C. N. S. 289. Communication will be excused if the emergency will not allow of any delay. *Elwell v. The Georgia*, 32 Fed. 843; *Barron v. Stewart*, L. R. 3 P. C. 199.

13. *The Giullo*, 27 Fed. 318; *Barron v. Stewart*, L. R. 3 P. C. 199. After the lapse of a reasonable time for receipt of an answer,

made an effort to procure funds on credit.¹⁴

Though the law does not require any particular form¹⁵ for the contract, except that all of the terms must be written,¹⁶ it is usually a bond. A bond bad in part, will be upheld if the invalid part can be rejected.¹⁷ Payment of the money borrowed is due when the ship arrives in safety in port,¹⁸ or if the vessel is sold,¹⁹ or if the voyage is not prosecuted,²⁰ or if there be any unnecessary²¹ deviation.²²

The term hypothecation, frequently used in connection with maritime contracts, is borrowed from the civil law and occupies a position somewhat intermediate between a mortgage and a pledge.²³ It is distinguished from a chattel mortgage inasmuch as the ownership of the property hypothecated is not transferred; and is distinguished from a pledge inasmuch as possession of the property hypothecated is not given.

§ 48. Money—Definition. Money is synonymous with "cash,"¹ and is used in five different senses, as follows:

- (1) Gold and silver coin.
- (2) Legal tender.²

the master has implied authority to act. *Droege v. Suart*, 3 P. C. 513.

14. *The Fortitude*, 3 Sumn. 257; *Soares v. Rahn*, 3 Moore P. C. 1.

15. *Force v. The Pride of the Ocean*, 3 Fed. 165; *The Cecile*, 4 Prob. Div. 210.

16. *The Dora*, 34 Fed. 344.

17. *The Virgin v. Vyfhuis*, 33 U. S. 550; *The Augusta*, 1 Doda. 283.

18. *The Great Pacific*, L. R. 2 A. & E. 334.

19. *The Draco*, 2 Sumn. 157.

20. *Force v. The Pride of the Ocean*, 3 Fed. 162.

21. *The Armadillo*, 3 W. Rob. 251.

22. *Wilmer v. The Smilax*, 2 Pet. Adm. 295; *Harman v. Van Hatton*, 1 Vern. Ch. 716.

23. Hypothecation might be described best by the paradoxical statement that it is a pledge without delivery of possession.

1. *Jacobs' Est.* 140 Pa. St. 268.

2. *Murphy v. Smith*, 49 Ark. 39; *Woodruff v. State*, 66 Miss. 309

(3) The common medium of exchange in a civilized nation.

(4) Anything customarily received by merchants as payment.

(5) Any kind of property, especially in wills.

Each of these meanings is narrower than the one following it; that is, each includes everything covered by the definitions preceding it. The first meaning was the original² and is now the strict and technical one,⁴ though seldom used. The third is the popular one, corresponding to what is designated as "currency,"⁵ that is, that which passes current, including "paper" money and national bank notes,⁶ and would be the meaning ordinarily attached to the term. A merchant, however, in speaking of his receipts for the day, would include checks;⁷ drafts, and, in some cases, promissory notes. In a will the word "money" would be given a very comprehensive meaning, and would include everything which the instrument showed the testator intended should pass to the beneficiary under that term. Many persons speak of their investments in government and municipal bonds and in corporate stocks as money;⁸ and the word has been

2. Abraham gave to Ephron "four hundred shekels of silver, current money with the merchant" for the field of Machpelah. (B. C. 1860) Gen. xxiii, 16.

4. Kinney, Law Dict. 467.

5. *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773. Gold or silver certificates are money. *Kimbrough v. State*, 28 Tex. App. 367.

6. *Tancil v. Seaton*, 69 Va. (28 Gratt.) 601, 24 Va. Rep. Ann. 192, 26 Am. Rep. 330; *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773.

7. To all practical intents a check is money. *Burke v. Bishop*, 78 La. (27 La. Ann.) 465, 21 Am. Rep. 567.

8. Where a testatrix gave all her "money" to an adopted daughter "in remembrance of her loving kindness," and left a United States bond of \$1,000, a city bond of \$1,000, and a promissory note for \$300, and but \$2.50 in currency, it was held that it all passed under the designation of "money." *Hinckley v. Primm*, 41 Ill. App. 579.

held to include personal property⁹ generally, and even land.¹⁰

§ 49. **Money—Kinds.** Money is the standard of value; and its coinage is a sovereign prerogative.¹¹ The currency issued by the government, consists of coins and of paper money.¹² The coins are of gold and of silver,¹³ and, in addition, a five-cent piece ("nickel"), and a one-cent piece,¹⁴ the latter two being designated as minor coins.¹⁵

The paper money coming from the presses of the United States, is of four kinds, United States Notes ("greenbacks"), Gold Certificates, Silver Certificates, and National Bank Notes. A United States Note promises to pay to the bearer the amount designated on its face, and

9. Rood, Wills, § 499, p. 334. In *Decker v. Decker*, 121 Ill. 341, the word "money" was held to express the residuum of the personal estate, consisting of loaned money and a little furniture.

10. *Re Est. of Miller*, 48 Cal. 165, 17 Am. Rep. 422. The popular expression, "a moneyed man," may mean one possessing much real estate. *Jacobs' Est.* 140 Pa. St. 268.

11. 1 Blacks. Comm. 277. One of the powers conferred on Congress by the U. S. Const. Art. I, § 8, clause 5, is "to coin money, regulate the value thereof, and of foreign coin;" and one of the restrictions placed upon the individual states by the Constitution, Art. I, § 10, clause 1, is that "No state shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts."

12. *Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653; *Leftwich v. Com.*, 61 Va. (20 Gratt.) 716.

The standard unit of value in the United States is the dollar, which is equal to twenty-five and three-tenths grains of gold, nine-tenths fine. Act of March 14, 1900; 31 St. Large, 45; 2 Fed. St. Ann. 131; *Consol. St.* 2357, § 1.

The portrait of a living person cannot be placed upon money. U. S. Rev. St. § 3576.

13. Gold, and silver, coins are nine-tenths pure, the other tenth consisting of an alloy, chiefly copper. U. S. Rev. St. § 3514.

14. The "nickel" is three-fourths copper and one-fourth nickel; and the cent, ninety-five per cent. copper, and five per cent. tin and zinc. U. S. Rev. St. § 3515.

15. *United States v. Bicksler*, 1 Mackey, 341.

is redeemable in gold.¹⁶ The Gold and Silver Certificates represent gold and silver deposited in the treasury of the United States, and are payable to the bearer on demand. National Bank Notes, in denominations from five dollars to one thousand dollars,¹⁷ are issued to national banks under certain conditions, being secured¹⁸ by bonds or other securities deposited¹⁹ with the Treasurer of the United States, the issue of other notes by national banks to circulate as money being prohibited.²⁰ A tax of ten per cent.²¹ on notes used for circulation, other than the national currency, renders competitive paper unprofitable, thus making our national currency the exclusive circulating medium.

§ 50. Money—Tender. A “tender” is an attempt or offer by one party under obligation, to perform it, the use of the term usually being restricted to cases where performance becomes impossible by reason of the other party refusing to accept the offer. Tender is “legal” when the law regards the attempt as sufficient. What constitutes the sufficiency of an attempt to pay money has been fixed by the decisions of the courts. Tender must be at a fit time and place,¹ and the money must be within the immediate control² of the tenderer, which

16. Act of March 14, 1900; 31 St. at Large, 45; 2 Fed. St. Ann. 131; Consol. St. 2357, § 2.

17. U. S. Rev. St. § 5175.

18. U. S. Rev. St. § 5167.

19. U. S. Rev. St. § 5159.

20. U. S. Rev. St. § 5183.

21. Act of Feb. 8, 1875, ch. 36; 18 St. at Large, 311, § 19; *Hollister v. Mercantile Inst.*, 111 U. S. 62.

1. *Waldron v. Murphy*, 40 Mich. 668.

2. *Lamar v. Sheppard*, 84 Ga. 561; *Steele v. Biggs*, 22 Ill. 643; *Blair v. Hamilton*, 48 Ind. 32; *Breed v. Hurd*, 23 Mass. 356; *Niederbauser v. Detroit Co.* (Mich. 1902), 91 N. W. 1028; *Pinney v. Jorgensen*, 27 Minn. 26; *North v. Mallett*, 3 N. Car. 151, 2 Am. Dec. 622; *Stakke v. Chapman*, 13 S. Dak. 269; *Farnsworth v. Howard*, 41 Tenn. 215; *Shank v. Groff*, 45 W. Va. 543; *Searight v. Calbraith*, 4 U. S. 325.

must be produced so that the creditor can take possession, and should be the exact amount due, including interest to date, and costs if a suit is pending, so that the creditor need not make change. Unreasonable³ conditions must not be annexed.

While the word "money" sometimes is used to mean legal tender, money, in the sense of currency, includes more than legal tender.⁴ The medium which constitutes a sufficient tender of payment is fixed by acts of Congress. Gold⁵ coins and silver dollars⁶ are legal tender for any amount; silver coins under⁷ one dollar are legal tender not to exceed ten dollars; minor coins⁸ are legal tender not to exceed twenty-five cents. Foreign coins are not legal tender⁹ in any case. United States Notes¹⁰ are legal tender for all debts public and private, except for duties on imports and interest on the public debt. Gold¹¹ and Silver¹² Certificates are not legal tender, though receivable for customs and all public dues. National Bank Notes¹³ are not legal tender except for debts due to or owing by the United States, with the restriction that they cannot be used for the payment of duties, or of interest on the public debt.

3. *Odum v. Rutledge Co.*, 94 Ala. 488; *Hall v. Norwalk Co.*, 57 Conn. 105; *Glos v. Goodrich*, 175 Ill. 20; *Rose v. Duncan*, 49 Ind. 269; *Shuck v. Chicago Co.*, 73 Iowa, 333; *Loring v. Cooke*, 20 Mass. 48; *Moore v. Norman*, 52 Minn. 83, 38 Am. St. 526; *Wheelock v. Tanner*, 39 N. Y. 481; *Redfern v. Ullery*, 12 Ohio Circ. Ct. 87, 5 Ohio Circ. Dec. 435.

4. *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773.

5. U. S. Rev. St. § 3585; 4 Fed. St. Ann. 792.

6. Act of February 28, 1878, c. 20.

7. Act of June 9, 1879, c. 12, § 3; 21 St. at Large, 8; 4 Fed. St. Ann. 793.

8. U. S. Rev. St. § 3587; 4 Fed. St. Ann. 794.

9. U. S. Rev. St. § 3584; 4 Fed. St. Ann. 792.

10. U. S. Rev. St. § 3588; 4 Fed. St. Ann. 794; Legal-tender Cases,

79 U. S. 457, reversing *Hepburn v. Griswold*, 75 U. S. 602, 68 Ky. 20.

11. Act of March 14, 1900, c. 41, § 6.

12. Act of February 28, 1878, c. 20, § 2.

13. U. S. Rev. St. § 5182.

Coin does not cease to be legal tender by age and by becoming somewhat rare;¹⁴ nor by becoming smooth if not light weight or indistinguishable;¹⁵ nor by having a hole punched in it, if none of the metal be removed;¹⁶ but there is no duty to receive a bill mutilated by having a considerable portion torn off.¹⁷ Coin reduced by natural abrasion not to exceed one-fortieth of one per cent. per annum up to twenty years, will be received at its nominal value by the United States Treasury;¹⁸ and mutilated United States notes will be redeemed.¹⁹

A check, though certified,²⁰ is not a sufficient tender, unless objection is made to the tender on other grounds²¹ than that it is a check.

While the medium for a sufficient tender has been fixed by law, this applies only where the parties themselves have not agreed previously as to the medium in which payment is to be made. It is proper for the parties to designate in their contract the exact kind of money

14. *Atlanta Co. v. Keeny*, 99 Ga. 266, 33 L. R. A. 324. The coin in this case was a half dollar of 1824.

15. *Jersey C'y v. Morgan*, 52 N. J. 60.

16. *U. S. v. Lissner*, 12 Fed. 840.

17. *North H. Co. v. Anderson*, 61 N. J. L. 248, 68 Am. St. 703, 40 L. R. A. 410. In this case a one dollar bill had a piece about one and one-half by one and one-fourth inches torn from the upper left hand corner; if any part is absent which might aid in determining whether the bill is genuine, a conductor is not under any duty to receive it for fare.

18. U. S. Rev. St. § 3505.

19. U. S. Rev. St. § 3580.

20. *People v. Hays*, 4 Cal. 127; *Larson v. Breene*, 12 Colo. 480; *Barbour v. Hickey*, 2 App. D. C. 207, 22 Wash. Law Rep. 57, 24 L. R. A. 763.

21. *Dale v. Richards*, 21 D. C. 312, 21 Wash. Law Rep. 86; *Sloan v. Petrie*, 16 Ill. 262; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. 415; *Browning v. Crouse*, 40 Mich. 342; *Collier v. White*, 67 Miss. 133; *Hengerson v. Cass County*, 107 Mo. 50; *Ricketts v. Buckstaff*, 64 Nebr. 651; *Mitchell v. Vermont Co.*, 67 N. Y. 280; *Jennings v. Mendenhall*, 7 Ohio St. 257; *Pershing v. Feinberg*, 203 Pa. St. 144; *Bradford v. Foster*, 37 Tenn. 4; *Jones v. Arthur*, 4 Jur. 359.

in which payment shall be made,²² as in gold coin; and if suit be brought on such a contract, the judgment can provide for its payment,²³ including costs,²⁴ in such coin.

§ 51. **Money—Title.** While, as a general rule, a person cannot transfer any better right to property than he has, money is a notable exception to this rule. If a person acquire specific pieces of money for a consideration, without notice that others have claims to it, he can hold the money as against such claimants; and, further, once having acquired a good title, he can transfer a good title to anyone else, although the transferee might receive it without consideration and with notice, except that if the original transferor, whose title was bad because the claims of others could be enforced against him, ever should come into its possession again, he would hold it subject to the rights of such claimants. He cannot free himself from his wrongful acts by passing the money through an innocent person. The interests of commerce require that the credit of currency passing by delivery should be unquestionable and its circulation unobstructed.²⁵ To illustrate the rule, suppose a ten dollar bill, owned by A., is stolen or found by B., and the latter buy something from C., paying therefor with this bill. If C. was ignorant of the circumstances under which B. came by the bill, C. could hold the bill as against A.; but if B. were to make C. a present of the bill, A. could compel C. to restore it to him, although C. took it under the belief that it belonged to B., for the element requiring the transfer to be for a consideration, would be lacking.

22. *Whitaker v. Dyer*, 56 Ga. 330; *Chesapeake v. Swain*, 29 Md. 483, 506; *Paddock v. Comm. Ins. Co.*, 104 Mass. 521; *Kellogg v. Sweeney*, 46 N. Y. 291; *Brouson v. Rodes*, 74 U. S. 229.

23. *Lane v. Gluckauf*, 28 Cal. 233, 87 Am. Dec. 121; *Linn v. Minor*, 4 Nev. 462, overruling *Milliken v. Sloat*, 1 Nev. 573.

24. *Carpentier v. Atherton*, 25 Cal. 546.

25. *Adkins v. Blake's Adm'rs*, 25 Ky. 40; *Saltus v. Everett*, 20 Wend. 267, 277, 13 N. Y. Com. Law, 350.

Likewise, if C., at the time he dealt with B., knew that B. had found or stolen the bill, C., could not hold the bill as against A.; for, although there was a consideration in this case, the element of good faith would be lacking. However, if, after C. had acquired the bill for value and without notice of A.'s rights, all of the facts should become known to D. and the public generally, C. could transfer a perfectly good title to the bill to D., even by gift; but, if the bill ever came into B.'s hands again, A. successfully could claim it from him. The mere fact that the circumstances would excite suspicion whether the offerer of money had any right to it, is not sufficient to defeat the taker's title. Bad faith alone will defeat it.²⁶ This is but stating the general rule of negotiability, which arises frequently in the case of promissory notes, bills of exchange and checks payable to a designated person, but which, practically has arisen very seldom in the case of currency, owing to the difficulty in following and identifying it. As a matter of public policy, money is exempt from execution liens.²⁷

26. *Merchants Co. v. Lawson*, 90 Ill. App. 18.

27. 2 Freeman, *Executions* (2d ed.) 1010, § 197; *Doyle v Sleeper*, 31 Ky. 531.

CHAPTER IV.

CHoses IN ACTION.

§ 52. **Meaning of Term.** Formerly the term Chose in Action was applied to a tangible article which was in the possession of some other person than its owner, and to recover which the owner was compelled to resort to an action at law. The term next was applied to this right of action. These meanings sufficed when personal property was limited in quantity, and consisted almost entirely of tangible articles. Later,¹ however, as personal property gradually increased in quantity and variety, until a very large portion of it consisted of intangible rights existing only in contemplation of the mind, courts and authors felt the need of some term which would embrace all of these invisible and incorporeal rights; and, for lack of a better designation, the meaning of the expression Chose in Action was enlarged by degrees until now it embraces all of these rights.

§ 53. **Classification.** Choses in Action, under the modern signification, can be divided² into six general classes, as follows:

I. Corporeal property not in the actual possession of the owner; which may be—

- A. Held subordinately.
- B. Held adversely.

1. "The words 'things in action' have undergone such a development from their original meaning that they now represent things to the imagination in the light of tangible objects." *Payne v. Elliott*, 54 Cal. 342.

2. See *First B'k v. Holland*, 99 Va. 495, 26 Am. St. 898, 55 L. R. A. 155; Warren, Choses, 3.

II. The intangible right to enforce a claim against another. This includes—

A. Admitted claims.

1. Before the time of performance has arrived.

2. After the time of performance has arrived.

B. Disputed claims.

III. Incorporeal rights growing out of relations; which may be—

A. Legal.

B. Equitable.

IV. The documentary evidence of rights.

V. The right to the possession of specific property or of documents evidencing rights, which are in the possession of another; which right to possession may be—

A. Immediate.

B. Future.

VI. Intangible rights against the public.

Illustrations of the above classes are as follows:

Class I, A. A horse which the owner has delivered to a livery-stable keeper to be taken care of for him.

Class I, B. A horse which has strayed from its owner, and in the possession of the finder who refuses to deliver it.

Class I relates to property in the possession of a bailee, or *quasi*-bailee; and it must be observed that, in the above illustrations, it is the horse itself—a tangible object, which is the chose in action, and not the right to the horse.

Class II. The right to enforce claims* generally, as

2. 2 Blacks. Comm. 397; *Mulhollan v. Thompson*, 13 Ark. 232; *Matter of Smith*, 30 Hun (37 N. Y. Supr.) 632; *Ayres v. Western R. R.*, 48 Barb. 132, 32 How Pr. 351; *Walker v. Bradford B'k*, 12 Q. B. D. 511.

Dower, before assignment, is a chose in action. *Summers v. Babb*, 13 Ill. 483; *Rayner v. Lee*, 20 Mich. 384; *Weaver v. Sturtevant*, 12 R. I. 537; *Downs v. Allen*, 78 Tenn. 652.

to compel the payment of a debt,⁴ a loan of money,⁵ rent,⁶ a mortgage,⁷ a deposit in bank,⁸ a judgment,⁹ or a legacy.¹⁰ This right is not the same before maturity as it is afterwards, as after maturity the owner has a right of immediate action against the other party which he did not have before, yet before maturity his right was property which he could assign. Claims arising from torts¹¹ are choses in action, as well as those arising under contracts.

Class III, A. The right¹² of a stockholder in a corporation, such as a right to dividends, if any, and the right to vote at corporate meetings, a share in a partnership,¹³ a share in an intestate's estate,¹⁴ annuities,¹⁵ pensions,¹⁶ rights of co-tenants, and of mortgagors¹⁷ and mortgagees.¹⁸

Class III, B. The interest of a *cestui que trust* in a fund.¹⁹

4. 2 Blacks. Comm. 396; *Brice v. Bannister*, 3 Q. B. D. 569.

5. *State v. Earl*, 1 Nev. 394; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

6. *Ex parte Rowell*, 39 L. J. N. S. 259.

7. *Wright v. Ross*, 36 Cal. 414.

8. *State v. Tenn. Co.*, 94 Tenn. 295; *Crook v. First B'k*, 83 Wis. 31, 41, 35 Am. St. 17; *Van Zile*, Illus. Cas. on Personalty, 104.

9. *Warren, Choses*, 20.

10. *Seys v. Price*, 9 Mod. 217.

11. *Magee v. Toland*, 8 Port. 36; *People v. Tioga*, 19 Wend. 73, 1 Gray, Cas. on Prop. 197; *Y. B. 5 Edw. IV. 8*, pl. 22.

12. *Union B'k v. Byram*, 131 Ill. 92; *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, aff'd 170 U. S. 36, 42 L. ed. 939; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; *Union B'k v. State*, 17 Tenn. 490; *Colonial B'k v. Whinney*, 11 App. Cas. 426, 30 Ch. D. 261.

13. *Small v. Oudley*, 2 P. Wms. 427.

14. *Bates v. Dandy*, 2 Atk. 207.

15. (*Eng. 1481*) *Y. B. 21 Edw. IV. 84*; *Wiltshire v. Rabbits*, 14 Sim. 76.

16. *Warren, Choses*, 25.

17. *Mattison v. Baucus*, 1 N. Y. 295, 4 How. Pr. 367, How. App. Cas. 639.

18. *Adams v. U. S. Mort. Co.*, 32 Miss. 263, 17 L. R. A. N. S. 138.

19. *Dearle v. Hall*, 3 Russ. 11, 27 Rev. Rep. 1.

The rights embraced under Class III are not rights to any specific money; nor are they necessarily rights to enforce payment, as in Class II, as the rights may not be violated, and, hence, at times, nothing would be due.

Class IV. A certificate²⁰ of stock in a corporation, evidencing the rights of the stockholder mentioned under Class III, a bill of lading,²¹ a charter-party,²² a railroad ticket, a bank-note,²³ a promissory note,²⁴ a draft,²⁵ negotiable instruments²⁶ generally, a certificate of deposit,²⁷ a savings bank book,²⁸ a bond,²⁹ deeds,³⁰ an insurance policy,³¹ and trading-stamps.³²

Class V, A. The right to a horse which is in the possession of a bailee,³³ or the right to title-deeds³⁴ in the hands of a third person. This must not be confused with the illustrations given above for Class I; as in that case, it is the horse itself which constitutes the chose in action, that is, the article itself in the possession of another

20. *Hutchins v. State B'k*, 53 Mass. 421; *People v. Reardon*, 184 N. Y. 431, 112 Am. St. 628, 8 L. R. A. N. S. 314; *Blake v. Jones*, 1 Bailey Eq. 141, 21 Am. Dec. 530.

21. *Warren, Choses*, 24.

22. *Boyd v. Mangles*, 16 M. & W. 342.

23. *U. S. v. Moulton*, 27 Fed. 11.

24. *Wright v. Ross*, 36 Cal. 414; *Linsensbigler v. Gourley*, 56 Pa. St. 166; *Royston v. McCulley* (Tenn. Ch. 1900), 52 L. R. A. 899.

25. *State v. Orwig*, 24 Iowa, 102.

26. *Master v. Miller*, 4 T. R. 340, 2 Rev. Rep. 399.

27. *Matter of Smith*, 30 Hun (37 N. Y. Supr.) 632; *Williford v. Phelan*, 120 Tenn. 589.

28. *Matter of Smith*, 30 Hun (37 N. Y. Supr.) 632.

29. *Warren, Choses*, 20.

30. *Regina v. Powell*, 21 L. J. M. C. 79.

31. *Collins v. Metropolitan Co.*, 232 Ill. 37, 122 Am. St. 54; *Mutual Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, 1 Gray, Cas. on Prop. 225; *Clark v. Allen*, 11 R. I. 439, 1 Gray, Cas. on Prop. 216; *Ex parte Ibbetson*, 8 Ch. D. 520.

32. See *Sperry Co. v. Weber*, 161 Fed. 219. A lottery ticket payable to bearer is a chose in action. *McLaughlin v. Waite*, 9 Cow. 670, *aff'd* 5 Wend. 404, 21 Am. Dec. 232.

33. 2 Blacks. Comm. 452.

34. (Eng.) Y. B. 9 H. VI, 6 pl. 64.

than the owner. In Class V the chose in action consists in the right to the horse, and is not the horse itself. Under this head can be placed a right of entry³⁵ into land, the right to the subject matter of a sale which can be enforced by specific performance; and the right of recaption where property has been seized by a thief.

Class V, B. The interest of a remainderman³⁶ or of a reversioner³⁷ in a specific chattel.

Class VI. The right of the owner of a patent,³⁸ copyright, or trademark to prevent unauthorized persons from infringement.

Some choses in action relate to tangible articles; others never can be more than intangible rights not manifest to the senses, and conceived only by the understanding; some of necessity involve disputes with particular persons; others are rights possessed, which never may be violated.

As will be seen from the classification, it is possible for the same thing to be doubly a chose in action; as, for illustration, a certificate of corporate stock is itself a chose in action under Class IV; if such certificate should get into the possession of one without right to it who refused to deliver it, it would fall likewise under Class V.

§ 54. **Changes in Form.** All choses in possession can be changed into choses in action, as by the owner of a tangible article parting with his possession it thus becoming a chose in action under Class I; some choses in action can be changed into choses in possession, as by the owner recovering possession of a tangible article which was out of his possession; and one kind of a chose in action can be changed into another, as by the owner

35. Warren, Choses, 19.

36. Broome v. King, 10 Ala. 319.

37. Ex parte Singleton, 61 L. T. 301.

38. Warren, Choses, 25.

of a horse in the possession of a third person, selling it and taking a note for the price; or by the recovery of a judgment on a promissory note. The chief occupation of the human race consists in making these varied changes; and most litigation concerns choses in action, as a person usually does not go to law about something already in his possession. Some of the more important choses in action will be treated at length in the subsequent chapters.

CHAPTER V.

INSURANCE.

§ 55. **Definition—Nature.** Insurance is a contract of indemnity¹ against possible loss, prejudice, damage, or liability, in regard to certain matters or things, on the happening or not happening of some specified event. The event insured against is known as the risk or peril.²

§ 56. **The Contract—Parties—Re-insurance.** In a contract of insurance the party promising indemnity is

1. Richards, *Ins.* (3d ed.) 27, § 24. Insurance sometimes is called assurance.

Insurance is a species of property. *Collins v. Metropolitan Co.*, 232 Ill. 37. The insured cannot be said not to receive anything in case the peril insured against does not occur, as he has had the protection.

Insurance sometimes is designated as an aleatory contract (*Richards, Ins.*, 3d ed. 23, § 24); as in one sense it is a wager whether a certain contingency will happen. Fire insurance is somewhat akin to a wager that a fire will or will not occur; life insurance, that the insured will or will not die within a specified time (*Clark v. Allen*, 11 R. I. 439, 1 Gray, *Cas. on Prop.* 216), the parties not knowing whether the event insured against will occur or not.

2. In modern times the perils insured against are very numerous, and may arise from natural causes or from human action, resulting in many kinds of insurance relating either to property, to the human body, or to business. Some of the common kinds of insurance are fire, marine, lightning, tornado (*Kennedy v. Agricultural Co.* [S. Dak.] 110 N. W. 116), hail (*Barrett v. Des Moines Ass'n*, 120 Iowa, 184), boiler (*Embler v. Hartford Co.*, 153 N. Y. 431), live stock (*State v. Vigilant Co.*, 30 Kans. 585), plate glass (*Vorse v. Jersey Co.*, 119 Iowa, 555, 97 Am. St. 330, 60 L. R. A. 838), title, burglary (*Bankers' Co. v. State B'k*, 150 Fed. 78), health, accident, fidelity (or guaranty as it sometimes is called), credit, forgery, rent (*Palatine Co. v. O'Brien* [Md. 1908], 63 Atl. 484), crop returns (*Re Hogan*, 8 N. Dak. 301, 73 Am. St. 759, 45 L. R. A. 166), loss of packages by mail (*Banco de Sonora v. Bankers' Co.* [Iowa], 95 N. W. 232), and liability, the designation in most cases indicating the peril insured against.

called the insurer or underwriter;³ the other, the insured or assured. In most instances the insurer is a corporation,⁴ though a large amount of insurance is in the hands of fraternal⁵ organizations and benefit societies, guilds, orders, unions, and the like, some of which are not incorporated and their members occupy a dual position, each being an insurer as to each of the other members and an insured as well.

Re-insurance is insurance of an insurer; that is, the insured himself is an insurer, the re-insurer assuming the whole or a part of a risk previously undertaken. Re-insurance usually arises when the original insurer has assumed so many risks in one district that he might be crippled, in event of a serious conflagration, if he were called upon to pay a large number of losses at one time; or when an insurer desires to retire from business either entirely or in a specified territory.

§ 57. The Contract—Oral Agreements—Benefit Associations. Unless required by statute⁶ a contract of insurance may be oral.⁷ Oral contracts may be either executed or preliminary; and preliminary oral contracts may be either a present insurance to be effective until a formal policy is delivered, or a contract to insure at a

3. In early times it was the custom to pass the proposed policy among the members of the society composed of men engaged in the business of insurance, and each member underwrote or subscribed his name for such portion of the amount required as he wished to undertake.

4. An individual may be an insurer; *Hoadley v. Purifoy*, 107 Ala. 276, 30 L. R. A. 351; *Barnes v. People*, 168 Ill. 425; unless there is a statute to the contrary. *Com. v. Vrooman*, 164 Pa. St. 306, 44 Am. St. 603, 25 L. R. A. 250.

5. *Richards, Ins.* (3d ed.) 3, § 3.

6. *Simonton v. Insurance Co.*, 51 Ga. 76.

7. *Richards, Ins.* (3d ed.) 102, § 80; *Stoelke v. Hahn*, 158 Ill. 79, 87; *Commercial Co. v. Urbansky* (Ky.), 68 S. W. 653; *Sanborn v. Fireman's Co.*, 82 Mass. 448, 77 Am. Dec. 419; *Pacific Co. v. Shaffer*, 30 Tex. Civ. App. 313; *Ritter v. Insurance Co.*, 169 U. S. 139, 42 L. ed. 693.

subsequent time. There is a distinction between a present oral executed contract of insurance and a preliminary contract to issue a policy.⁸ A contract to insure at a subsequent time is not a contract of insurance; though a failure to perform it makes the insurer liable to an action for its breach,⁹ the measure of damages, if the event insured against has occurred, being the same as the amount which would have been recoverable under the contract of insurance if issued.¹⁰ If a policy, drawn up but not delivered, is not to be considered effective until the premium is paid, it cannot be enforced if the premium has not been paid; but if a binding agreement has been made, a court of equity will decree the execution and delivery of the policy;¹¹ and if such action be brought after a loss has occurred, the decree will direct payment of the amount which would have been recoverable under the policy if it had been issued.¹² Preliminary oral contracts of present insurance sometimes are aided by a written memorandum, called a binding slip, containing a statement of the important terms of the agreement though not all of them. Where the preliminary, informal contract contemplates the execution and delivery of a formal policy, the rights and liabilities of the parties under the informal, preliminary contract are determined by conditions of the policy expected though not issued.¹³

8. *Franklin Co. v. Colt*, 87 U. S. 567, 22 L. ed. 423.

9. *Preferred Co. v. Stone*, 61 Kans. 48; *Sanford v. Insurance Co.*, 174 Mass. 416, 75 Am. St. 358.

10. *Klein v. Insurance Co. (Ky.)*, 57 S. W. 250; *Hicks v. Assurance Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Campbell v. Insurance Co.*, 78 Wis. 100, *Woodruff, Ins. Cas.* 76.

11. *Flint v. Ohio Co.*, 8 Ohio, 501.

12. *Western Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. 423; *Phoenix Co. v. Ryland*, 69 Md. 437, 1 L. R. A. 548; *Woody v. Insurance Co.*, 72 Va. (31 Gratt.) 362, 31 Am. Rep. 733; *Commercial Co. v. Union Co.*, 60 U. S. 318, 15 L. ed. 636.

13. *Lipman v. Niagara Co.*, 121 N. Y. 454, 8 L. R. A. 719, *Richards, Ins. Cas.* 100. The act and time of delivery of the policy

The contract of insurance in a benefit society is contained in the certificate issued to the member and from its charter and by-laws.¹⁴ If the association expressly has reserved¹⁵ the right to make changes in the by-laws, its members are bound¹⁶ by any reasonable¹⁷ changes therein.

§ 58. **The Contract—Policies—Classification.** Like any important contract, that of insurance should be, and usually is, in writing. A policy¹ is a written instrument embodying a contract of insurance, which, unless required by statute, need not be in any particular form, though usually quite formal. Every student should read a policy with a view to learning and understanding the provisions² contained therein; and, to aid him to that

are of comparatively trifling significance. *Richards, Ins.* (3d ed.) 96, § 75. The legal presumption is that the usual form of policy is to follow. *Richards, Ins.* (3d ed.) 103, § 82; *Vinnig v. Franklin Co.*, 39 Mo. App. 311; *Agricultural Co. v. Fritz*, 61 N. J. L. 211; *Newark Co. v. Kenton Co.*, 50 Ohio St. 549, 22 L. R. A. 768.

14. *Richards, Ins.* (3d ed.) 458, § 332.

15. If the right to make changes in its by-laws has not been reserved by a society, such changes will not affect those who are members at the time of a change. *Miller v. Tuttle* (Kans. 1903), 73 Pac. 88; *Weber v. Supreme Tent*, 172 N. Y. 490, 92 Am. St. 753.

16. *Bowie v. Grand Lodge*, 99 Cal. 392; *Gilmore v. Knights*, 77 Conn. 58; *Covenant Co. v. Kentner*, 188 Ill. 431; *Shipman v. Protected Circle*, 174 N. Y. 398, 63 L. R. A. 347.

17. Even though the right to make changes in its by-laws has been reserved by a society, its members are not bound by unreasonable changes. *Supreme Council v. Jordan*, 117 Ga. 808; *Russ v. Modern Brotherhood*, 120 Iowa, 692; *Russ v. Supreme Council*, 110 La. 588, 98 Am. St. 469; *Porter v. American Legion*, 183 Mass. 326; *Starling v. Supreme Council*, 108 Mich. 440, 62 Am. St. 709; *Hall v. West Ass'n*, 69 Nebr. 601; *Beach v. Supreme Tent*, 177 N. Y. 100; *Strauss v. Mut. Ass'n*, 128 N. Car. 465; *Sovereign Camp v. Fraley*, 94 Tex. 200, 51 L. R. A. 898.

1. Latin, *pollicitatio*, a promise.

2. It is estimated that ninety per cent. of the persons accepting contracts of insurance never read them, although a contract of insurance contains many important provisions; and in many cases its validity is of the greatest importance. If a person accepting a policy

end, a copy of the standard form used by most fire insurance companies will be found in the Appendix.

Policies are the subject of several classifications.³ As to the peril insured against, they are classified as fire, life, marine, etc. As to amount, they are valued or open.

A Valued policy is one in which a definite valuation by agreement is placed upon the subject-matter. Policies upon ships and upon lives usually are valued.⁴ In event of the policy becoming payable, the valuation named is conclusively the basis of settlement.

An Open⁵ or unvalued policy is one in which the value of the subject matter is not specified but left to be ascertained in case of loss; though an amount may be, and usually is, named which limits the liability of the insurer. Fire insurance policies are usually open, the liability of the insurer being the amount of the actual loss not exceeding the amount named therein.

§ 59. The Contract — Consideration — Construction. The Premium is the consideration for the contract. A level or flat premium is a fixed sum payable at stated intervals. An Assessment is a premium exacted whenever a loss occurs, the amount being determined by apportioning the loss and expense among all those liable; and is the method usually employed in fraternal organizations.

of insurance without question, were requested to become a party to any other contract half as long, half as complicated, or half as important, he would think it would be impossible for him to entertain it without consulting an attorney.

3. Policies sometimes are classified, as to insurable interest, into interest and wager policies; though a wager policy, being one in which the insured does not possess any interest in the subject matter, is not a contract but a void agreement. *Cisna v. Sheibley*, 88 Ill. App. 385; 2 Blacks. Comm. 460.

4. Richards, Ins. (3d ed.) 21, § 18.

5. In some states by statute the insured can recover, in event of a total loss, the full amount named in a policy of fire insurance, thus practically making them valued.

A contract of insurance is construed as any other contract is.⁶ Papers referred to in the policy will become a part⁷ thereof if such an intention is indicated; but slips called "riders" attached to a policy become a part thereof without reference.⁸ The general rule of construction, that doubtful or ambiguous language is taken more strongly against the party using it, has extensive application in contracts of insurance, which almost without exception are in the language of the insurer; and, hence, in case of doubt the insured is favored.⁹ However, if the contract is clear, the court will not ingraft upon it a different meaning.¹⁰

§ 60. **Conditions, Warranties and Representations.** Before a contract is consummated there are more or less extensive preliminary negotiations leading up to it, during which statements are made by the parties, either voluntarily or in response to questions; and these statements are more or less instrumental in inducing one or both of the parties to enter into the subsequent contract. Many or all of these statements, in substance, may be in-

6. *American Co. v. Reigart*, 94 Ky. 547, 42 Am. St. 374, 21 L. R. A. 651; *Stettiner v. Insurance Co.*, 5 Duer (12 N. Y. Super. Ct.) 594; *Farmers' Co. v. Marshall*, 29 Vt. 23; *Crane v. Insurance Co.*, 3 Fed. 558.

7. *Richards, Ins.* (3d ed.) 139, § 106.

8. *Hardy v. Insurance Co.*, 166 Mass. 210, 55 Am. St. 395, 33 L. R. A. 241; *Jackson v. Insurance Co.*, 106 Mich. 47, 30 L. R. A. 636; *Haws v. Association*, 114 Pa. St. 431; *Mort v. Insurance Co.*, 68 Vt. 253; *Pool v. Insurance Co.*, 91 Wis. 530, 51 Am. St. 919; *Phoenix Co. v. Wilcox & Gibbs*, 65 Fed. 724, 13 C. C. A. 33, 25 U. S. App. 201.

9. *Richards, Ins.* (3d ed.) 148. Where a policy contained a warranty by the insured that his storehouse was "detached at least one hundred feet" without stating from what, the court interpreted it as meaning detached from buildings that would affect the risk. *Burleigh v. Gebbard Co.*, 90 N. Y. 220.

10. Where a policy provided that it should be void if the property became encumbered by a chattel mortgage, a chattel mortgage afterwards given, though subsequently discharged, avoids, not suspends, the policy. *German-Am. Co. v. Humphrey*, 62 Ark. 349, 54 Am. St. 297.

corporated in the contract, either in the body of it or by reference to an existing instrument which contains them. These stipulations, in insurance law, are known as representations, warranties or conditions.

A Representation is a statement of facts or circumstances made at the time of, or before, the closing of the contract, and relating to the proposed adventure, upon the faith of which statement the agreement is reached.¹

A Warranty, sometimes called a condition, is a stipulation in the contract that some particular thing shall, or shall not, be done, or an affirmation that a particular state of facts exists or does not exist.

The distinction between a representation and a warranty is that a representation precedes the contract, hence is collateral² thereto and a matter of inducement merely. A warranty is one of the terms in³ the completed contract. A statement that was a representation prior to the time the contract is consummated, becomes a warranty by being incorporated into, and made an essential part of, the completed contract. To constitute a warranty a particular form of words is not required;⁴ nor need the word "warrant" be used.

Representations may be classified as oral and written; and as material and immaterial. A Material representation is one which might influence the judgment of a prudent insurer in fixing the premium or determining whether he will assume the risk,⁵ or of the insured in determining

1. Richards, Ins. (3d ed.) 128, § 97.

2. Richards, Ins. (3d ed.) 138, § 105.

3. Richards, Ins. (3d ed.) 136, § 103.

4. Richards, Ins. (3d ed.) 137, § 104.

5. Richards, Ins. (3d ed.) 131, § 99. As in the case of warranties, representations sometimes are classified as affirmative and promissory, these terms having about the same meaning as when used in connection with warranties. See, *post*, n. 23. A promissory representation, being usually an expression by the insured of an intention to do something, does not have any effect unless made in bad faith. *Kimball v. Insurance Co.*, 91 Mass. 540, 85 Am. Dec. 786; *Alston v. Insurance Co. (N. Y.)* 4 Hill, 329; *Prudential Co. v. Astna Co.*, 23 Fed. 438.

whether he will enter into the contract, and relates to facts which would increase, or diminish, the chances of loss.⁶ Conversely, an Immaterial representation is one which absolutely cannot have any weight either in inducing the insurer or the insured to enter into the contract, or in fixing the rate of premium. A material⁷ representation of fact must be substantially⁸ correct. A material misrepresentation by either party or by an authorized agent of either party renders the contract voidable⁹ at the option of the other party, though made innocently¹⁰ or unintentionally and a subsequent loss arises from a cause totally unconnected with the material fact concealed or misrepresented; because a true disclosure might have led the insurer to decline the insurance altogether and thus he would have escaped the loss.¹¹

6. If the insured makes a false statement that he arrived in the city that morning when in fact he had arrived three days previously, and such statement did not enter into the contract, it would be immaterial.

7. The burden is on the insurer to prove that a representation is material. *Daniels v. Insurance Co.*, 66 Mass. 416, 59 Am. Dec. 192; *Jefferson Co. v. Cotheal*, 7 Wend. 72, 22 Am. Dec. 567; *Fidelity Co. v. Alpert*, 67 Fed. 460, 14 C. C. A. 474.

8. *Richards, Ins.* (3d ed.) 129, § 97. An answer that the insured was not then, and never had been, directly or indirectly "engaged" in the manufacture or sale of alcoholic beverages is not untrue because he occasionally, out of his ordinary line of duties, which was that of a servant at a hotel, furnished guests with intoxicating liquors by direction of his employer, and took pay therefor. *Gulltinnan v. Metropolitan Co.*, 69 Vt. 469.

9. *Palatine Co. v. Kehoe*, 197 Mass. 354, 15 L. R. A. N. S. 1007; *Armour v. Transatlantic Co.*, 90 N. Y. 450; *Edwards v. Footner*, 1 Campb. 530.

10. The question of fraud is not necessarily involved in a concealment. *Burritt v. Insurance Co.* (N. Y.), 5 Hill, 188, 40 Am. Dec. 345, *Woodruff, Ins. Cas.* 105; *Sun Co. v. Ocean Co.*, 107 U. S. 485, 27 L. ed. 337. Thus in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, it was held that a policy on a cargo was avoided because it had been lost in a wreck occurring before the policy was taken out, such prior loss having been known to an agent of the insured and would have been known by the insured if the agent had performed his duty.

11. *Richards, Ins.* (3d ed.) 132, § 99.

A failure to disclose all material facts known is called a Concealment. A contract of insurance is one of those known as *uberrimae fidei* (Latin, of the greatest good faith), the insurer of necessity being compelled to rely partially or entirely upon the statements of the insured, thus making their relation a fiduciary one and imposing a duty not only not to conceal anything but to make a full, free and truthful disclosure of all facts which would have an influence in inducing the other to enter into a contract.¹²

An immaterial misrepresentation is wholly without effect; and a representation which is merely an expression of opinion, of expectation, or of belief,¹³ or an exaggerated estimate of value, ordinarily requires good faith only.¹⁴

A warranty must be performed literally,¹⁵ substantial compliance, as in the case of a representation, not being sufficient. A warranty, unlike a representation, never is immaterial; it is conclusively presumed to be material,

12. *Manhattan Co. v. Weill*, 69 Va. (28 Gratt.) 389. It would be fraudulent for the insured not to disclose the fact, known to him, that a fire was raging in the vicinity of the property to be insured. *Orient Co. v. Parker*, 91 Ill. App. 278. Failure to inform the insurer that a ship had been reported as seen at sea deep in the water and leaky, will avoid a contract of insurance on the goods carried on such vessel, though the report was erroneous and the loss resulted from an entirely different cause. *Lynch v. Hamilton*, 3 Taunt. 37. An applicant for life insurance would be guilty of concealment if he withheld the intelligence that he was about to fight a duel. *Penn. Mut. Co. v. Mech. Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

13. *Richards, Ins.* (3d ed.) 149, § 111. The erroneous opinion or belief of an applicant for life insurance, in regard to latent diseases, is not fatal unless made in bad faith. *Henn v. Met. Ins. Co.*, 67 N. J. L. 310; *Endowment Knights v. Cogbill*, 99 Tenn. 29; *Schwarzbeck v. Union*, 25 W. Va. 622, 52 Am. Rep. 227.

14. *Richards, Ins.* (3d ed.) 131, § 98.

15. *Richards, Ins.* (3d ed.) 140, § 107. Every dishonest loss is a wrong, not only to the insurer but to the public, as the insured must make payment in higher premiums; and not to insist upon a strict performance of warranties leads to fraud and perjury. *Richards, Ins.* (3d ed.) 135, § 102.

so that a trivial statement can be made material by causing it to become a term in the contract.¹⁶ Inability of the insured from sickness, insanity, death, or other cause, to comply with the requirements of his warranties does not offer any excuse for nonperformance;¹⁷ and a breach of a warranty will avoid the policy although such breach occurred without the knowledge of the insured.¹⁸

Conditions or warranties may be divided into three classes;¹⁹ those precedent to a valid inception of the contract;²⁰ those relating to the contract during the pendency of the risk; and those appertaining to the presentation and enforcement of the claim of the insured after a loss. Warranties are classified also as express and implied,²¹ and as affirmative and promissory.²² An Affirmative warranty relates to a stipulation or state of facts prior to, or contemporaneous with, the inception of the insurance. A Promissory warranty relates to something to be done or omitted during the pendency of the

16. *Kelly v. Life Ins. Co.*, 113 Ala. 453; *Germier v. Insurance Co.*, 109 La. 341; *Cobb v. Association*, 153 Mass. 176, 25 Am. St. 619, 10 L. R. A. 666; *Hoose v. Insurance Co.*, 84 Mich. 309, 11 L. R. A. 340; *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Flippen v. Insurance Co.*, 30 Tex. Civ. App. 362; *Metropolitan Co. v. Rutherford*, 98 Va. 195; *Jeffries v. Insurance Co.*, 89 U. S. 47, 22 L. ed 833.

17. *Richards, Ins.* (3d ed.) 145, § 108.

18. Where a tenant allowed fireworks to be set off upon the insured premises on the night of the Fourth, the policy providing that it should be void "if there be kept, used or allowed on the above-described premises * * * fireworks," the owner of the premises, although not having any knowledge of the celebration, could not recover for a loss. *Westchester Co. v. Ocean Co.* (Va. 1907) 56 S. E. 584.

19. *Richards, Ins.* (3d ed.) 280, § 288.

20. *Union Co. v. Pauly*, 8 Ind. App. 85; *St. Louis Co. v. Kennedy*, 69 Ky. 450; *Whiting v. Insurance Co.* 129 Mass. 240, 37 Am. Rep. 317; *Helman v. Insurance Co.* 17 Minn. 153, 10 Am. Rep. 154; *Union Co. v. Parker*, 66 Nebr. 395, 62 L. R. A. 390; *Ormond v. Association*, 96 N. Car. 158; *Oliver v. Insurance Co.* 97 Va. 134.

21. Warranties usually are not implied except in marine insurance.

22. *Richards, Ins.* (3d ed.) 136, § 103.

contract.²³ If an affirmative warranty is untrue, the policy is voidable as soon as issued; but if a promissory warranty be not fulfilled, the policy, originally valid, becomes voidable.²⁴

Conditions are presumed to have been complied with until the contrary has been shown.²⁵ They may be waived;²⁶ and such waiver may be inferred from circumstances,²⁷ or implied from inconsistency.²⁸ The insurer can waive conditions in policies placing restrictions upon the authority of agents;²⁹ and can waive conditions that waivers must be made in some specified manner, as by writing indorsed on the policy.³⁰ Facts, however, cannot be waived, as that the agent of the in-

23. *Richards, Ins.* (3d. ed.) 137, § 103; *Smith v. Insurance Co.* 32 N. Y. 399; *Gilliat v. Insurance Co.*, 8 R. I. 282, 91 Am. Dec. 229; *Schultz v. Insurance Co.*, 6 Fed. 672. A statement that a building has brick partitions would be affirmative; while a statement that it will be occupied, or that a watchman will be kept on the premises, or that gunpowder will not be stored therein, would be promissory.

24. *Richards, Ins.* (3d ed.) 142, § 107.

25. *Peoria Co. v. Lewis*, 18 Ill. 553.

26. A condition that the premium must be paid before the contract shall be binding, may be waived. *Farnum v. Insurance Co.*, 83 Cal. 246, 17 Am. St. 233; *McAllister v. Insurance Co.*, 101 Mass. 558, 3 Am. Rep. 404, *Woodruff, Ins. Cas.* 140; *Boehm v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Southern Co. v. Booker*, 65 Tenn. (9 Heisk.) 606, 24 Am. Rep. 344; *Wytheville Co. v. Telger*, 90 Va. 277; *Eagan v. Insurance Co.*, 10 W. Va. 583; *Miller v. Insurance Co.*, 79 U. S. 285, 20 L. Ed. 398.

27. *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566.

28. Where an insurer knowingly issues a policy upon a building in the possession of a tenant, a provision in the policy that it shall be void if the building shall be in such possession, is waived. "Having accepted a premium to take a risk of indemnifying against loss, it is incompatible for the insurer to attach to the policy a condition that will from the beginning relieve him of that risk." *Ohio Co. v. Vogel*, 166 Ind. 239, 3 L. R. A., N. S. 966.

29. *Knickerbocker Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689, *Richards, Ins. Cas.* 399, *Elliott, Ins. Cas.* 52.

30. *German Co. v. Gibson*, 53 Ark. 494; *Tillis v. Insurance Co.* (Fla.), 35 So. 171; *Corson v. Insurance Co.*, 113 Iowa, 641; *City Co. v. Merchants' Co.*, 72 Mich. 654, 16 Am. St. 552; *Billings v. Insurance Co.*, 34 Nebr. 502.

surer shall be regarded as the agent of the insured;³¹ nor can a right be waived if the public is concerned in the maintenance of such right.³²

§ 61. **Insurance on Property.** What has been said thus far in regard to insurance applies to the subject generally; but it is evident that there must be some points applicable to certain branches of insurance law which would not apply to others. Thus, some rules are peculiar to insurance which relates to property, some to insurance which relates to the human body, and some to insurance which relates to business. A few of these different branches will be considered.

Policies on property are classified as time or voyage. A Time¹ policy is one which designates certain dates definitely when the liability of the insurer begins and ends. A Voyage² policy designates certain geographical termini between which the insurer is liable; such policies are used most often in marine insurance.

Generally in insurance on property the insured is liable for the entire premium as soon as the risk attaches;³ though it is competent for the parties to agree upon payment in annual installments.⁴ If, by any act of the insured, his policy is forfeited he cannot recover the unearned premium; but if the insurer terminates the contract without any breach by the insured, the latter can recover the entire premium paid⁵ with interest⁶ unless

31. *Kausal v. Insurance Co.*, 31 Minn. 17, 47 Am. Rep. 776, Richards, Ins. Cas. 392, Woodruff, Ins. Cas. 517.

32. The right to set up the defense of want of insurable interest cannot be waived by an insurer so as to make a void agreement a valid contract. *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. 650, 42 L. R. A. 247; *Anctil v. Insurance Co.* [1899] App. Cas. 609.

1. Richards, Ins. (3d ed.) 21, § 19.

2. *Cornfoot v. Royal Ass'n*, [1903] 2 K. B. 363.

3. *Schimp v. Insurance Co.*, 124 Ill. 354; *Plymton v. Dunn*, 148 Mass. 523; *Tyrie v. Fletcher*, 2 Cowp. 666, Richards, Ins. Cas. 265.

4. *American Co. v. Stoy*, 41 Mich. 385.

5. *Clark v. Insurance Co.*, 130 Ind. 332.

6. *McKee v. Insurance Co.*, 28 Mo. 383, 75 Am. Dec. 129; *Strauss*

the contract provides otherwise. If owing to fraudulent⁷ misrepresentations a policy be void from the beginning, the insured cannot recover his premium, though it is otherwise if he acted innocently.⁸

§ 62. Fire Insurance—Policies—Insurable Interest. Many states have prescribed the form of a fire insurance policy.¹ These forms are more or less similar, and generally are used in those states in which a form has not been prescribed.

Policies are classified, as to subject matter, into specific and blanket, running or floating. A Specific policy is one on a particular piece of property. A Blanket policy is one covering a number of different pieces of property for an aggregate amount without apportionment. Thus, a person owning two houses, each worth \$2,000, might take a specific policy upon each, naming a limit of recovery, as \$1,000, on each particular house; or he might take out one blanket policy for \$2,000 covering both of them without specifying the amount recoverable upon each one. In event of the total destruction of one house he could recover but \$1,000 under his specific policy, but could recover \$2,000 under the blanket policy, and the contract then would be terminated by full performance, leaving nothing to be recovered thereon if damage subsequently should occur to the other building.

v. Association, 128 N. Car. 976, 54 L. R. A. 605; *McCall v. Insurance Co.*, 9 W. Va. 237, 27 Am. Rep. 558.

7. *Himely v. Insurance Co.*, 1 Mill, 153, 12 Am. Dec. 623; *Blaesser v. Insurance Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Georgia Co. v. Rosenfeld*, 95 Fed. 358, 37 C. C. A. 96; *Prince of W. Co. v. Palmer*, 25 Beav. 605.

8. *Insurance Co. v. Pyle*, 44 Ohio St. 19, 58 Am. Rep. 781; *Jones v. Insurance Co.*, 90 Tenn. 604, 25 Am. St. 706; *Feise v. Parkinson*, 4 Taunt. 639.

1. Among these states are Connecticut, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, West Virginia, and Wisconsin. See *Richards, Ins.* (3 Ed.) 691.

An Insurable Interest in property is one which would be affected injuriously by a destruction of such property, by causing a loss² of money or of a legal right, or a liability. As the essence of insurance is indemnity, it follows that an insurable interest is necessary;³ and if the insured does not have an insurable interest the agreement is void.⁴

A legal⁵ or an equitable⁶ estate will constitute an insurable interest; and the interest of the insured may be absolute or qualified.⁷ A person having no other in-

2. *Lycoming Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Phoenix Co. v. Adams' Trustee*, 8 Ky. Law Rep. 532; *Eastern Co. v. Relief Co.*, 98 Mass. 420; *Farmers' Co. v. Mickel*, 72 Neb. 122; *Sheppard v. Peabody Co.*, 21 W. Va. 368.

3. *Metropolitan Co. v. Ellison* (Kans. 1905), 3 L. R. A. N. S. 934; *Morgan v. Segenfelder* (Ky. 1907), 14 L. R. A. N. S. 1172; *Farmers' Co. v. New Hol. Co.*, 122 Pa. St. 37.

4. *Helmetag's Adm'r v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Guardian Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Burton v. Insurance Co.*, 119 Ind. 207, 12 Am. St. 405; *Rombach v. Insurance Co.*, 86 La. (35 La. Ann.) 233, 48 Am. Rep. 239; *Singleton v. Insurance Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Trinity College v. Travelers' Co.*, 113 N. Car. 244, 22 L. R. A. 291; *United Soc. v. McDonald*, 122 Pa. St. 324, 9 Am. St. 111, 1 L. R. A. 238; *Brockway v. Insurance Co.*, 9 Fed. 249.

5. *Richards, Ins.* (3d ed.) 34, § 26. An assignee for the benefit of creditors, although holding the legal title only, has an insurable interest. *Phoenix Co. v. Adams' Trustee*, 8 Ky. Law Rep. 532; *Sibley v. Insurance Co.*, 57 Mich. 14.

6. *Richards, Ins.* (3d ed.) 35, § 27. A buyer of goods where the title has been reserved by the seller, has an insurable interest although his title is equitable only. *Bohn Co. v. Sawyer*, 169 Mass. 477; *Hanover Co. v. Shrader*, 11 Tex. Civ. App. 255.

7. *Richards, Ins.* (3d ed.) 36, § 29. A bailee has such an interest as may be the subject of a valid contract of insurance; *Smith v. Huddleston*, 103 Ala. 223; *Hartford Co. v. Keating*, 86 Md. 130, 63 Am. St. 499; *Ferguson v. Pekin Co.*, 141 Mo. 161; *Waring v. Insurance Co.*, 45 N. Y. 606, 6 Am. Rep. 146; *Lockhart v. Cooper*, 87 N. Car. 149, 42 Am. Rep. 514; *Roberts v. Fireman's Co.*, 165 Pa. St. 55, 44 Am. St. 642; *Lancaster Mills v. Merchants' Co.*, 89 Tenn. 1, 24 Am. St. 586; *Wagner v. Westchester Co.*, 92 Tex. 549; *McLaughlin v. Park B'k*, 22 Utah, 473, 54 L. R. A. 343; *Thompson v. Insurance Co.*, 136 U. S. 287, 34 L. ed. 408; either against loss of benefits;

terest in property than a lien⁸ has an insurable interest to the extent of his claim. Defeasible,⁹ contingent,¹⁰ and inchoate¹¹ interests are insurable. Policies upon changing stocks of goods,¹² or upon expected profits of a venture,¹³ are valid. A judgment creditor has an insurable interest in goods seized under execution;¹⁴ and stockholders have an insurable interest in the property of the corporation.¹⁵

In order to have an insurable interest it is not essential that the insured possess the entire interest, a partial¹⁶ interest being insurable; thus a partner, a joint tenant or a tenant in common can insure his particular interest separately without uniting the others interested in the property;¹⁷ nor does insuring one kind of interest prevent the insurance of another kind of interest in the same property. Thus a mortgagor and a mortgagee each could have insurance at the same time upon the mortgaged property.¹⁸

Putnam v. Insurance Co., 46 Mass. 386; or against the liability which he might incur by a destruction of the chattels. *Oliver v. Greene*, 3 Mass. 133, 3 Am. Dec. 96; *Crowley v. Cohen*, 3 B. & Ad. 478.

8. *Richards, Ins.* (3d ed.) 36, § 30.

9. *Richards, Ins.* (3d ed.) 33, § 25.

10. *Fenn v. New O. Co.*, 53 Ga. 578. Such would be the case in re-insurance.

11. *Boston Co. v. Globe Co.*, 174 Mass. 229, 75 Am. St. 303; *Sun Ofs. v. Merz*, 64 N. J. L. 301, 52 L. R. A. 330; *New York Co. v. Mechanics' Co.*, 2 Hall, 125; *Rhind v. Wilkinson*, 2 Taunt. 237.

12. *Lane v. Insurance Co.*, 12 Me. 44, 28 Am. Dec. 150; *Lee v. Insurance Co.*, 65 Mass. 324; *Hoffman v. Insurance Co.*, 32 N. Y. 405, 38 Am. Dec. 337.

13. *Loomis v. Shaw*, 2 Johns. Cas. 36; *Patapsco Co. v. Coulter*, 28 U. S. 222, 7 L. ed. 659; *Barclay v. Cousins*, 2 East, 544.

14. *Hancox v. Fishing Co.*, 3 Sumn. 132.

15. *Crawford v. Aachen Co.*, 100 Ill. App. 454, aff'd *Aachen Co. v. Crawford*, 199 Ill. 367; *Warren v. Insurance Co.*, 31 Iowa, 464, 7 Am. Rep. 160; *Riggs v. Insurance Co.*, 125 N. Y. 7, 21 Am. St. 716, 10 L. R. A. 684; *Seamen v. Enterprise Co.*, 18 Fed. 250, 21 Fed. 778.

16. *Inglis v. Stock* (Eng.), 10 App. Cas. 263.

17. *Moitke v. Mil. Mich. Co.*, 113 Mich. 166; *Page v. Fry*, 2 B. & P. 240.

18. *Miller v. Gibbs* (N. Y.), 108 App. Div. 103.

§ 63. Fire Insurance—Double Insurance. Where the insured enters into two or more contracts of insurance on the same identical risk and subject-matter, it is known as double insurance;¹⁹ but double insurance does not result from insurance of the same subject-matter by two or more persons if the insurable interest of each is not the same. Thus insurance by a mortgagor and by a mortgagee,²⁰ or by a life tenant and by the remainderman,²¹ or by a landlord and by his tenant,²² of their own interests in the same subject-matter, is not double insurance.

§ 64. Fire Insurance—Assignability. If property, which is the subject-matter of insurance, is sold, voluntarily¹ or involuntarily,² the policy is avoided; as, unless such an intention is indicated therein, the contract does not attach to the property;³ and even if the original owner should repurchase the property, the policy would not be reinstated.⁴ A contract of insurance, as long as it remains executory, that is, before a loss occurs, is not assignable⁵ without the con-

19. *Lowell Co. v. Safeguard Co.*, 88 N. Y. 591; *Cal. Ins. Co. v. Union Co.*, 133 U. S. 387, 33 L. ed. 730.

20. *Richards, Ins.* (3d ed.) 320.

21. *Franklin Co. v. Drake*, 41 Ky. 47.

22. *Clemson v. Trammell*, 34 Ill. App. 414.

1. *Richards, Ins.* (3d ed.) 343, § 263. Transfers between partners are regarded as changes in title. *Hathaway v. Insurance Co.*, 64 Iowa, 229. So is a conveyance to a third person in trust for the assured. *Insurance Co. v. Jensen*, 56 Neb. 284.

2. *McLaren v. Hartford Co.*, 5 N. Y. 151. A foreclosure of an existing mortgage avoids the policy if done without the consent of the insurer as provided in the policy. *Commercial Co. v. Scammon*, 102 Ill. 46.

3. *Richards, Ins.* (3d ed.) 76, § 60.

4. *Stuart v. Reliance Co.*, 179 Mass. 434; *Cockerill v. Cincinnati Co.*, 16 Ohio, 148.

5. *Richards, Ins.* (3d ed.) 78, § 63; *White v. Robbins*, 21 Minn. 370; *New Eng. Co. v. Kenneally*, 38 Neb. 895; *Kase v. Insurance Co.*, 58 N. J. L. 34; *Fisher v. Insurance Co.*, 69 N. Y. 161.

A marine policy is assignable, the demands of mercantile business overriding the theory that the contract is strictly personal.

sent⁶ of the insurer, as he might be willing to insure one person who is careful and whose reputation is good, while he might be very unwilling to incur any liability to one who has had many losses and therefore is regarded with suspicion; but after a loss has occurred,⁷ so that the insured has a money claim against the insurer, such claim is assignable without the consent⁸ of the insurer.

§ 65. **Fire Insurance—Recovery for Losses.** A loss by fire means the result of ignition of the property insured or of some substance near it.¹ Fires are classified as friendly and hostile, a friendly fire being one that remains in the place where it was intended; other fires are hostile. The policy covers losses from a hostile,² but not from a friendly,³ fire. Thus it does not cover damage caused by overheating⁴ from a fire remaining in place, nor by smoke⁵ from such a fire, as from a lamp.⁶ To be covered by the policy the loss must be direct, immediate or proximate, and not remote.⁷

Earl v. Shaw, 1 Johns. Cas. 314, 1 Am. Dec. 117; *Sparks v. Marshall*, 2 Bing. N. Cas. 761.

6. *Continental Co. v. Muns*, 120 Ind. 30, 5 L. R. A. 430; *Lyford v. Conn. I. Co.*, 99 Me. 273.

7. *Greenwich Co. v. Columbian Co.*, 73 Ill. App. 560; *Roger W. Co. v. Carrington*, 43 Mich. 252; *Imperial Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. 636.

8. *Nease v. Insurance Co.*, 32 W. Va. 233.

1. *Richards, Ins.* (3d ed.) 284, § 231.

2. If a fire extend beyond the place where it belongs it becomes a hostile fire, which is the peril insured against. *Way v. Abington Co.*, 166 Mass. 67, 55 Am. St. 379, 32 L. R. A. 608.

3. *Heuer v. Insurance Co.*, 144 Ill. 393, 19 L. R. A. 594; *Briggs v. Insurance Co.*, 53 N. Y. 446; *United Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Mitchell v. Insurance Co.*, 133 U. S. 42, 46 L. ed. 74.

4. *Gibbons v. Insurance Co.*, 30 Ill. App. 263; *American Co. v. German Co.*, 74 Md. 25; *Austin v. Drew*, 4 Campb. 360, 6 Taunt. 435.

5. *Cannon v. Phoenix Co.*, 110 Ga. 563, 78 Am. St. 124.

6. *Fitzgerald v. German-Am. Co.*, 62 N. Y. Supp. 324, 30 Misc. 72; *Samuels v. Insurance Co.*, 2 Pa. Dist. 396.

7. *Lynn Co. v. Meriden Co.*, 153 Mass. 570, 35 Am. St. 540, 20 L. R. A. 237; *California Co. v. Union Co.*, 133 U. S. 337.

The fact that the loss resulted from the negligence of the insured⁸ will not prevent recovery; but if the loss was due to the intentional⁹ act of the insured or of his servant,¹⁰ the insurer is not liable, except in case of insanity¹¹ of the person committing the act.

The insurer never is liable beyond the amount named in the policy. If there are several losses during the term for which the policy was issued, the liability of the insurer terminates completely as soon as the total amount paid on such losses equals the amount named in the policy.¹² If after one loss is paid the insured wishes protection for the original amount, he must take out additional insurance. In an open policy the insurer is not liable for more than the actual cash value of the prop-

Unless expressly excluded by the terms of the policy a direct loss from fire includes injury from the fall of a building resulting from fire, although the insured building is not burned in any way; *Ermentrout v. Girard Co.*, 63 Minn. 305, 56 Am. St. 431, 30 L. R. A. 346; injury from smoke; *Scripture v. Insurance Co.*, 64 Mass. 356, 57 Am. Dec. 111; and from water used in an effort to extinguish a fire; *Davis v. Insurance Co.*, 115 Mich. 382; *Boak Co. v. Manchester Co.*, 84 Minn. 419; the expense of removal of insured goods and their damage by such removal; *Richards, Ins.* (3d ed.) 285, § 231; *Case v. Insurance Co.*, 13 Ill. 676; *White v. Republic Co.*, 57 Me. 91, 2 Am. Rep. 22; and loss from theft while being removed. *Leiber v. Insurance Co.*, 69 Ky. 639, 99 Am. Dec. 695; *Witherell v. Insurance Co.*, 49 Me. 200; *Newmark v. Insurance Co.*, 30 Mo. 160, 77 Am. Dec. 608; *Sklencher v. Fire Ass'n* (N. J. L.), 60 Atl. 232; *Whitehurst v. Insurance Co.*, 51 N. Car. 352; *Independent Co. v. Agnew*, 84 Pa. St. 96, 75 Am. Dec. 638; *Stanley v. Western Co.*, L. R. 3 Exch. 74, 37 L. J. Exch. 73.

Loss by fire does not include loss by lightning without ignition; *Kenniston v. Insurance Co.*, 14 N. H. 341, 40 Am. Dec. 193; *Everett v. London Co.*, 19 C. B. N. S. 126; a steam explosion; *Richards, Ins.* (3d ed.) 286, § 231; nor injury from escaping steam. *Gibbons v. German Co.*, 30 Ill. App. 263.

8. *Richards, Ins.* (3d ed.) 287, § 231.

9. *Richards, Ins.* (3d ed.) 59, § 49.

10. *Waters v. Insurance Co.*, 36 U. S. 213, 9 L. ed. 69.

11. *Bindell v. Kenton Co.* (Ky. 1908), 17 L. R. A. N. S. 129; *Karow v. Insurance Co.*, 57 Wis. 56, 46 Am. Rep. 17.

12. *Mechanics' Co. v. Hodge*, 149 Ill. 292.

erty at the time of the loss,¹³ with proper deductions for depreciation however caused;¹⁴ nor can the insured recover more than is sufficient to indemnify him for his interest at the time of the loss.¹⁵ If the property is injured only and not destroyed, the measure of indemnity,¹⁶ is the difference between its actual cash value just before the fire and its value after the fire.

The original insured does not acquire any rights¹ under a contract of re-insurance unless the contract of re-insurance provides that the re-insurer is to pay the policy-holders, or unless by virtue of the rule in some states that when a contract is made for the benefit of a third person the latter can enforce it.² When the re-insured brings an action he must prove his interest and the fact and the amount of the loss just as in the case of any insurance; and the re-insurer is entitled to the same defenses against the re-insured as the latter would have against the original insured.

In case of double insurance, the insured can recover his loss but once;³ but he can recover the whole loss from one insurer⁴ unless there is provision to the contrary in the policy.⁵ Usually such a provision is inserted, limiting the amount recoverable from any insurer to such proportion of the loss as the amount insured by him bears to the total amount of insurance.

13. The market value at the time of the fire is recoverable. *Western Co. v. Studebaker*, 124 Ind. 176; *Stenzel v. Penn Co.*, 110 La. 1019; *Mitchell v. Insurance Co.*, 92 Mich. 594; *Hickerson v. Insurance Co.*, 96 Tenn. 193; *German Co. v. Everett* (Tex. Civ. App.), 36 S. W. 125.

14. *Richards, Ins.* (3d ed.) 296, § 239.

15. *Richards, Ins.* (3d ed.) 72, § 59.

16. *Richards, Ins.* (3d ed.) 298, § 239.

1. *Richards, Ins.* (3d ed.) 445, § 319.

2. *Barnes v. Hekla Co.*, 56 Minn. 38, 45 Am. St. 432.

3. *Williamsburg Co. v. Gwinn*, 88 Ga. 65.

4. *Richards, Ins.* (3d ed.) 432, § 315.

5. *Richards, Ins.* (3d ed.) 61, § 51.

Ascertaining the amount to be paid to the insured as indemnity after a loss has occurred is called an Adjustment. The policy usually provides for certain steps to be taken in reaching an adjustment, such as giving notice⁶ to the insurer and making proof⁷ of loss; but if the insurer, objecting to the proofs as furnished, refuses to point out the defects therein, such defects are waived;⁸ or if the insurer refuses to make payment, such refusal not being based on imperfections and deficiencies in the proof of loss, such imperfections and deficiencies are considered as waived;⁹ or if, in such a case, proofs have not been furnished, they are waived entirely¹⁰ and suit can be brought at once without waiting for the expiration of the time usually provided in the policy before instituting legal proceedings.¹¹ Policies generally provide for arbitration¹² between the parties in case they cannot agree; but this matter is governed by the same rules as apply to any contract.

§ 66. Fire Insurance—Contribution. Co-insurers, as in the case of double insurance, have the right of contribution.¹³ Thus, if a building should be insured for one thousand dollars in one company and for two thousand dollars in another, and the company in which insurance for two thousand dollars was held should pay a six hundred dollar loss in full, it could recover two hun-

6. Richards, Ins. (3d ed.) 401, § 296.

7. Richards, Ins. (3d ed.) 407, § 300.

8. Birmingham Co. v. Pulver, 126 Ill. 329, 9 Am. St. 630.

9. Peoria Co. v. Whitehill, 25 Ill. 466; Virginia Co. v. Goode, 95 Va. 762.

10. Richards, Ins. (3d ed.) 179, § 145.

11. French v. Fidelity Co., 135 Wis. 259, 17 L. R. A. N. S. 1011.

12. Richards, Ins. (3d ed.) 418, § 306. A condition for arbitration cannot operate to deprive the insured of his right of action unless clearly made a condition precedent to the existence of such right. Birmingham Co. v. Pulver, 126 Ill. 329, 9 Am. St. 630.

13. Richards, Ins. (3d ed.) 61, § 51.

dred dollars, being one-third of the loss, from the other company, such being the proportion which one policy bears to the other.

§ 67. **Marine Insurance.** The risks usually assumed in a policy of marine insurance include not only losses from natural causes, but also those from fires, pirates, jettisons,¹ and numerous other perils. In view of the great risk taken, there are three implied warranties in every contract of marine insurance. They relate to seaworthiness, deviation, and the legality of the adventure.

A voyage policy never attaches unless at the beginning² of the voyage the vessel leaves port in a seaworthy condition.³ A vessel is in a seaworthy condition when in a fit state of repair, properly equipped and manned, and in all other respects able to encounter the ordinary perils of the intended voyage.⁴ Insurance on a vessel is discharged by a deviation from the voyage even though the deviation did not increase the risk or contribute to the loss⁵ or was to save property,⁶ the vessel being required to pursue the customary course between the terminal points named in the policy; and the voyage must be prosecuted with all reasonable dispatch,⁷ an unreasonable delay being treated as a deviation.⁸

1. Richards, Ins. (3d ed.) 614, § 435.

2. Richards, Ins. (3d ed.) 221, § 183.

3. Merchants' Co. v. Morrison, 62 Ill. 242, 14 Am. Rep. 93; Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Van Wickle v. Insurance Co., 97 N. Y. 350; Seaman v. Insurance Co., 21 Fed. 778; Lemelin v. Assurance Co., 1 Quebec, 337; Wedderburn v. Bell. 1 Campb. 1.

4. La Fernier v. Soo Co. (Mich. 1903), 89 N. W. 353; Hedley v. Pinkney Co. (1894), App. Cas. 222 (1892), 1 Q. B. 58.

5. Richards, Ins. (3d ed.) 231, § 186.

6. Richards, Ins. (3d ed.) 237, § 188.

7. Richards, Ins. (3d ed.) 234, § 187.

8. Augusta Co. v. Abbott, 12 Md. 348; Amsinck v. Insurance Co., 60 N. Y. 482, 19 Am. Rep. 204; Oliver v. Insurance Co., 11 U. S. 437, 3 L. ed. 414; Company of African M. v. British Co., L. R. 8 Exch. 154.

The insurance is not affected if the vessel be driven out of her course unavoidably by a storm. Richards, Ins. (3d ed.) 236, § 188;

In marine insurance the insured is treated as a co-insurer to the extent of the difference between the value of the property and the amount of insurance taken. Thus, if a vessel worth one hundred thousand dollars and insured for eighty thousand dollars, or four-fifths of its value, be damaged to the extent of fifty thousand dollars, the insurer would be required to pay only four-fifths of the loss, or forty thousand dollars, the insured being treated as an insurer of the other one-fifth.

§ 68. **Life Insurance—Policies.** While life insurance resembles fire insurance in many ways, there are several differences between them. Everyone must die, it being only a question when, whereas property is not destined to be destroyed by fire. Some of the matters peculiar to life insurance will be noticed.

Life policies are of various kinds, known as old style, endowment, tontine, term, joint life, and survivorship. A Regular or old style ¹ life policy is one in which a fixed premium is paid at certain intervals during life, the policy becoming payable only at death of the person insured. An Endowment ² policy is one payable at the expiration of a stipulated period or upon the predecease of the person insured, being in the nature of an investment, as the person insured will receive the benefit of it if he survive the period named,³ which he cannot do under the regular or old style policy; but if the insured should die

or departs from her course to avoid an imminent peril, such as to escape capture; *Whitney v. Haven*, 13 Mass. 172; *Patrick v. Ludlow*, 3 Johns. Cas. 10, 2 Am. Dec. 130; *O'Reilly v. Gonne*, 4 Campb. 249; or to procure necessary repairs; *Turner v. Protection Co.*, 25 Me. 515, 43 Am. Dec. 294; *Hall v. Insurance Co.*, 26 Mass. 466; *Miller v. Russell*, 1 Bay. 309; or to save life. *Dabney v. Insurance Co.*, 96 Mass. 300; *Fernandez v. Insurance Co.*, 48 N. Y. 571, 8 Am. Rep. 571; *The Iroquois*, 194 U. S. 240; *Scaramauga v. Stamp*, 5 C. P. D. 295, 49 L. J. C. P. 674.

1. *Richards, Ins.* (3d ed.) 23, § 21.

2. *Walker v. Giddings*, 103 Mich. 344.

3. *Miller v. Campbell*, 140 N. Y. 457.

within the stipulated period a designated sum is payable at once, the policy thus becoming, in effect, a regular life policy. A Term policy is one taken for a specified number of years, in this respect resembling a fire insurance policy, and being payable only upon the decease of the person insured during that period, and not otherwise. A Limited Payment policy is payable at the death of the person insured, but the payment of the premiums ceases after a stipulated period. A Joint Life policy and a Survivorship policy are upon the lives of two or more, the former being payable upon the death of the earliest, and the latter upon the death of the latest. A Tontine⁴ policy is one in which it is agreed that certain accumulations or profits of the business shall be apportioned among those of the insured of a certain class surviving at certain intervals,⁵ the lapsed policies of the class forfeiting their reserve and dividends to the survivors.

§ 69. Life Insurance—Parties—Amount—Insurable Interest. In most kinds of insurance there are but two parties—the insurer and the insured; but in life insurance there frequently are other persons interested, as the benefit cannot be paid to the insured after his death, but must go to someone else. If some other person is designated by the terms of the contract to receive the proceeds of the insurance, he is called the beneficiary.

While insurance is theoretically a contract of indemnity, life insurance is not strictly so, owing to the difficulty of fixing a value upon human life; hence, any amount of insurance can be taken on the life of a person which might be a benefit to the insured, except in the case of a creditor as hereinafter noticed.

A person may procure insurance on the life of another when he is so related to the latter by blood, by marriage,

4. Devised by Lorenzo Tonti, an Italian, in 1656.

5. *N. Y. Ins. Co. v. Miller*, 22 Ky. Law Rep. 230; *Columbia B'k v. Equitable Assn. (N. Y.)*, 79 App. Div. 601; *Ellison v. Straw*, 119 Wis. 502.

or by business dealings, that he has reasonable expectations of deriving benefit from the continuation of that other's life, or of suffering detriment or of incurring liability from its termination.⁶ Every person has an insurable interest in his own life;⁷ and, by weight of authority, it is not necessary that the person designated by him as beneficiary have any interest in his life,⁸ provided it is not a device to evade the law against wagering contracts. A legal right to require services or to receive benefit of whatever kind, is sufficient to validate insurance on the life of a near relative, although such services or benefit is not received.⁹ A husband¹⁰ or wife¹¹ has the right to insure the life of the other; an employee has an insurable interest in the life of his employer;¹² and a creditor can insure the life of his debtor.¹³ The interest of the creditor is governed by the amount of the indebtedness, though the insurance need not be limited to the exact amount of the debt, but may be large enough to indemnify the creditor against all reasonable expenses

6. *Rombach v. Insurance Co.*, 86 La. (35 La. Ann.) 233, 48 Am. Rep. 239; *United Soc. v. McDonald*, 122 Pa. St. 324, 9 Am. St. 111, 1 L. R. A. 238; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

7. *Richards, Ins.* (3d ed.) 40, § 34.

8. *Richards, Ins.* (3d ed.) 50, § 40; *Ancient Ord. v. Brown*, 112 Ga. 545; *Elkhart Ass'n v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514; *Heinlein v. Imperial Co.*, 101 Mich. 250, 45 Am. St. 409, 25 L. R. A. 627; *Sabin v. Phinney*, 134 N. Y. 423, 30 Am. St. 681.

Contra, *Morgan v. Segenfelder* (Ky. 1907), 14 L. R. A. N. S. 1172; *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570. See also *Equitable Co. v. Hazlewood*, 75 Tex. 338, 16 Am. St. 393, 7 L. R. A. 217.

9. *O'Rourke v. Insurance Co.*, 31 N. Y. Supp. 130, 10 Misc. 405.

10. *Currier v. Insurance Co.*, 57 Vt. 496, 52 Am. Rep. 134.

11. *Rombach v. Insurance Co.*, 86 La. (35 La. Ann.) 233, 48 Am. Rep. 239; *Mutual Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Watson v. Insurance Co.*, 21 Fed. 695.

A woman has an insurable interest in the life of her fiancé. *Chisholm v. Insurance Co.*, 52 Mo. 213, 14 Am. Rep. 414; *Taylor v. Insurance Co.*, 15 Tex. Civ. App. 254.

12. *Hebdon v. West*, 3 B. & S. 579.

13. *Richards, Ins.* (3d ed.) 45, § 36.

connected therewith;¹⁴ but if the amount is unreasonably large it will be regarded as a wager.¹⁵ A surety can insure the life of his principal, the latter being his contingent debtor.¹⁶

§ 70. **Life Insurance—Assignment—Change of Beneficiary.** By weight of authority a life policy, validly taken out, can be assigned to one not having any insurable interest, provided the transaction is in good faith,¹⁷ even though the proceeds of the policy may exceed greatly the amount paid.¹⁸ It is exceedingly doubtful if strangers are any more apt either to desire or to seek

14. *Shaffer v. Spangler*, 144 Pa. St. 223; *Equitable Co. v. Hazelwood*, 75 Tex. 338, 16 Am. St. 893, 7 L. R. A. 217.

15. *Grant's Adm'r's v. Kline*, 115 Pa. St. 618; *Cammack v. Lewis*, 82 U. S. 643, 21 L. ed. 244.

16. *Embry's Adm'r v. Harris*, 104 Ky. 61; *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192.

17. The assignee of a life policy, not having any interest and buying merely as a matter of speculation, cannot acquire any rights; *Franklin Co. v. Hazzard*, 41 Ind. 116, 1 Gray, Cas. on Prop. 213; nor can a person who induced the insurance under an arrangement that he was to bear all of the expense and that such an assignment was at once to be made to him. *Hanover v. Insurance Co.*, 57 Mo. App. 343; *Mutual Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997. Where such an agreement has been made, not only is the assignee unable to recover, but the original beneficiary will not be allowed to do so if a party to the illegality. *Metropolitan Co. v. Ellison* (Kans. 1905), 3 L. R. A. N. S. 934.

18. *Fitzgerald v. Insurance Co.*, 56 Conn. 116, 7 Am. St. 288; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. 620; *Metropolitan Co. v. Brown*, 159 Ind. 644; *Farmers' B'k v. Johnson* (Iowa), 91 N. W. 1074; *Hearing's Suc.*, 77 La. (26 La. Ann.) 326; *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844; *Mutual Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, 1 Gray, Cas. on Prop. 225; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68; *Mechanics' B'k v. Comins* (N. H.), 55 Atl. 191; *Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. 427, 44 L. R. A. 417; *Eckel v. Renner*, 41 Ohio St. 232; *Ulrich v. Reinhoehl*, 143 Pa. St. 233, 24 Am. St. 534; 13 L. R. A. 433; *Crosswell v. Association*, 51 S. Car. 103; *Mutual Co. v. Hamilton*, 37 Tenn. 269; *Fairchild v. Association*, 51 Vt. 613; *Bursinger v. Bank*, 67 Wis. 75, 58 Am. Rep. 848; *Vezina v. Insurance Co.*, 6 Can. 30; *Ashley v. Ashley*, 3 Sim. 149. *Contra*, *Price v. Supreme Lodge*, 68 Tex. 361.

to accomplish the death of others than are those nearly related to them.¹⁹ The rights of a person absolutely designated as the recipient of moneys to be paid under a contract of life insurance, are vested and indefeasible without his consent,²⁰ that is, he has the right to recover any moneys that ultimately may become due under the terms of the policy. Generally in mutual benefit societies the insured arbitrarily may change the beneficiary, the contract being solely with the member and not with the beneficiary; but such change must be made in accordance with the regulations of the association,²¹ a mere intention to change, however clear, not being sufficient.²²

§ 71. Life Insurance—Representations and Warranties. Before a policy of life insurance is issued, the insured usually is required to submit to a medical examination and to respond to numerous questions detailed upon a printed application blank, the answers to which are written by the agents of the insurer;¹ and by an express term in the contract the statements and agreements in the application are made a part of the policy and warranted to be true, this making such statements

19. *Chamberlain v. Butler*, 61 Neb. 720, 87 Am. St. 478, 54 L. R. A. 338.

20. *Griffith v. Insurance Co.*, 101 Cal. 639, 40 Am. St. 101; *Hendrie Co. v. Platt*, 13 Colo. App. 15; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94; *Harley v. Heist*, 86 Ind. 196, 45 Am. Rep. 285; *Wirgman v. Miller*, 98 Ky. 624; *Preston v. Insurance Co.*, 95 Md. 101; *Pingrey v. Insurance Co.*, 144 Mass. 374; *Holmes v. Gilman*, 138 N. Y. 382, 34 Am. St. 463, 20 L. R. A. 566; *Hooker v. Sugg*, 102 N. Car. 115, 11 Am. St. 717, 3 L. R. A. 217; *Overhiser's Adm'r v. Overhiser*, 63 Ohio St. 77, 81 Am. St. 612, 50 L. R. A. 552; *Washington Co. v. Berwald (Tex.)*, 76 S. W. 442; *Central B'k v. Hume*, 128 U. S. 195, 32 L. ed. 370.

21. *Richards, Ins.* (3d ed.) 86, § 68.

22. A former wife, though divorced eight years, is entitled to payment on the death of the insured if a change of beneficiary never has been made, although the insured married again. *Brown v. Grand Lodge*, 208 Pa. St. 101.

1. *Richards, Ins.* (3d ed.) 98, § 77.

of fact and stipulations, express warranties.* The questions answered in the application relate to present and past health of the applicant; the physical and mental health of his relatives and their ages at death and the causes of their death; whether the applicant has other policies of life insurance; whether any prior application for insurance has been rejected; and to the age, habits, occupation, and residence of the applicant. To violate a warranty as to good health it must appear that the sickness was one having a tendency to shorten life or permanently to impair the health, or that it amounted to a vice in the constitution;² for health is a relative term, probably no one being free from ailments.

§ 72. **Life Insurance—Premiums—Forfeitures.** So far as it is executory the ordinary life policy is unilateral, that is, the insured is not bound to pay any premium that may be due in the future,⁴ nonpayment of future premiums resulting only in affecting his rights; but a member of a fraternal society is liable on his promise to pay future assessments⁵ unless he has secured a cancellation of his certificate and has paid all liabilities up to the date thereof.⁶

A policy usually provides that it shall cease unless premiums are paid when due,⁷ in which case punctuality in the payment of each premium as, from time to time, it becomes due, is essential to the continued validity of the insurance,⁸ unless a tender of the premium has been

2. Richards, Ins. (3d ed.) 471, § 345.

3. Richards, Ins. (3d ed.) 478, § 347.

4. Worthington v. Charter Co., 41 Conn. 372, 19 Am. Rep. 495; Goodwin v. Insurance Co., 73 N. Y. 480.

5. Bacon v. Clyne, 70 Mich. 183; Ellerbe v. Barney, 119 Mo. 632, 23 L. R. A. 435; Akers v. Hite, 94 Pa. St. 394, 39 Am. Rep. 792.

6. Telford v. Church, 66 Mich. 431.

7. Richards, Ins. (3d ed.) 495, § 359.

8. Mutual Ass'n v. Minehart, 72 Ark. 630; Holly v. Metrop. L. Co., 105 N. Y. 437; Nederland Co. v. Meinert, 199 U. S. 171.

wrongfully refused.⁹ Sickness, paralysis, absence, or other inability to comply with the terms of the contract, does not furnish any excuse for nonpayment of the premium stipulated;¹⁰ nor, in the absence of agreement¹¹ or of a statutory provision,¹² is the insurer under any obligation to notify the insured that a premium will be due.¹³ The beneficiary can prevent a default by paying or tendering it himself in time;¹⁴ and, in any case, the insurer, by receiving an overdue premium, waives the right to claim a forfeiture.¹⁵

The rule that forfeitures are looked upon by the courts with ill favor and enforced only when the strict letter of a contract requires it, applies with full force to policies of insurance.¹⁶ If a policy does not provide that it shall terminate upon nonpayment of the premium, the in-

9. *Travelers' Co. v. Pulling*, 159 Ill. 603; *Kantrener v. Insurance Co.*, 5 Mo. App. 581; *Shear v. Insurance Co.*, 4 Hun, 800. A tender once refused excuses tenders of subsequent premiums. *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *National Co. v. Home Soc.*, 181 Pa. St. 443, 59 Am. St. 666. Even a tender is excused if the insurer repudiates the contract before the premium is due. *Hayner v. Insurance Co.*, 69 N. Y. 435; *Manhattan Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806; *Girard Co. v. Mutual Co.*, 86 Pa. St. 236.

10. *School Dist. v. Dauchy*, 25 Conn. 530; *Carpenter v. Association*, 68 Iowa, 453, 56 Am. Rep. 855; *Webb v. Insurance Co.*, 63 Md. 217; *Wheeler v. Insurance Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. ed. 765.

11. *Supreme Lodge v. Dalberg*, 138 Ill. 503; *Schmidt v. Insurance Co.*, 4 Ind. App. 340; *Castner v. Insurance Co.*, 50 Mich. 273; *Columbia Co. v. Buckley*, 83 Pa. St. 298; *McCorkle v. Association*, 71 Tex. 149.

12. *Griffith v. Insurance Co.*, 101 Cal. 627, 40 Am. St. 96; *Phelan v. Insurance Co.*, 113 N. Y. 147, 10 Am. St. 441; *McCbnnell v. Society*, 92 Fed. 769, 34 C. C. A. 663.

13. *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. ed. 765.

14. *Pingrey v. Insurance Co.*, 144 Mass. 374; *McGlynn v. Curry* (N. Y.), 82 App. Div. 431; *Mutual Co. v. Hill*, 178 U. S. 347, 44 L. ed. 1097.

15. *Mutual Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Sweetser v. Association*, 117 Ind. 97; *Walsh v. Insurance Co.*, 30 Iowa, 133, 6 Am. Rep. 664; *Mutual Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Phoenix Co. v. Doster*, 106 U. S. 34, 37 L. ed. 67.

16. *Connecticut Co. v. Jeary*, 60 Nebr. 338, 51 L. R. A. 698.

insurance is not forfeited by such nonpayment.¹⁷ In mutual benefit associations and beneficiary societies the nonpayment of an assessment usually occasions suspension or forfeiture of all rights on the part of the delinquent member¹⁸ unless the association or society chooses to reinstate him.

In the absence of statute or agreement, a policy lapsed for nonpayment of premium does not have any surrender value,¹⁹ that is, the insured is not entitled to recover anything from the insurer, although the premiums during the earlier years are larger than the hazard requires. A forfeiture terminates all legal and equitable rights of the insured. Frequently, however, by statute, express agreement, or both, an insured who is delinquent in the payment of his premiums, is allowed to receive some benefit from the premiums previously paid by him, provided he complies with certain conditions.²⁰

A policy is not avoided by the death of the insured from suicide, if there is no stipulation to the contrary and the policy was taken out for the benefit of others.²¹ If there is a doubt whether the insured committed suicide, the burden is on the insurer to show it.²² The execution of the insured for crime, however, prevents recovery,²³ it

17. *Mutual Co. v. Allen*, 212 Ill. 134; *Stewart v. Union Co.*, 155 N. Y. 257, 42 L. R. A. 147.

18. *Richards, Ins.* (3d ed.) 504, § 363. In order that membership may be forfeited the assessment must be reasonable; *Covenant Ass'n v. Kentner*, 188 Ill. 431; *American Soc. v. Helburn*, 85 Ky. 1, 7 Am. St. 571; *Swing v. Lumber Co.*, 62 Minn. 162; *Sands v. Graves*, 58 N. Y. 94; *Rosenberger v. Insurance Co.*, 87 Pa. St. 207; *Hartford Co. v. Hyde*, 101 Tenn. 396; *Mutual Ass'n v. Taylor*, 99 Va. 208; and made in strict accordance with the charter and by-laws. *Richards, Ins.* (3d ed.) 507, § 364.

19. *Haskell v. Society*, 181 Mass. 341.

20. *Richards, Ins.* (3d ed.) 502, § 361.

21. *Richards, Ins.* (3d ed.) 512, § 367.

22. *Richards, Ins.* (3d ed.) 517, § 370.

23. *Burt v. Union Co.*, 187 U. S. 362, 47 L. ed. 216, aff'g 44 C. C. A. 548, 105 Fed. 419, 59 L. R. A. 393; *Amicable Soc. v. Bolland*, 4 Bligh., N. R. 194.

being contrary to public policy that any of the restraints upon the commission of crime be removed. Feloniously²⁴ causing the death of the insured²⁵ by the beneficiary will prevent recovery although the motive was other than the one of obtaining the insurance.²⁶

Policies usually provide that, after two years, they will be incontestable except for nonpayment of premium; which means that the insurer will make any desired and needful investigation into the circumstances and good faith of the insured; and if, within that period no action has been taken by the insurer to rescind the contract, the policy will be paid without litigation,²⁷ unless provisions to be complied with after the death of the insured are not complied with.²⁸

§ 73. **Accident Insurance.** An Accident is an event which takes place without the forethought or expectation of the person acted upon or affected.¹ An injury may be accidental though brought about designedly by another person,² or though resulting from the intentional act of

Contra: Collins v. Metropolitan Co., 232 Ill. 37, 122 Am. St. 54, which is based on the ground that otherwise the laws of descent and of wills would be changed.

24. The rights of the beneficiary are not affected if he, while insane, kills the insured. Holdom v. Ancient Ord., 159 Ill. 619, 50 Am. St. 183, 31 L. R. A. 67.

25. New Y. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997; Cleaver v. Reserve Ass'n [1892], 1 Q. B. 147.

In such cases, the proceeds go to the estate of the insured. Schmidt v. Northern Ass'n, 112 Iowa, 41, 84 Am. St. 323, 51 L. R. A. 141, 51 Cent. Law J. 465.

26. Schreimer v. High Court, 35 Ill. App. 576.

27. Richards, Ins. (3d ed.) 531, § 378.

28. Richards, Ins. (3d ed.) 532, § 378.

1. Richards, Ins. (3d ed.) 538, § 385. Accident insurance covers injuries arising from inhalation of gas. United S. Ass'n v. Newman, 84 Va. 52.

2. Richards v. Insurance Co., 89 Cal. 170, 23 Am. St. 455; Am. Acc. Co. v. Carson, 99 Ky. 441, 59 Am. St. 473, 34 L. R. A. 301; Fidelity Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206; Accidental Co. v. Bennett, 90 Tenn. 256, 25 Am. St. 685; Button v. Am. Mut. A., 92 Wis. 83; Ripley v. Railway Co., 20 Fed. Cas. 823, aff'd 83 U. S. 336, 21 L. ed. 469.

the insured, provided such result was not foreseen by him.³

An accident policy usually contains a provision excluding liability of the insurer for injury or death of the insured caused by voluntary exposure to unnecessary danger,⁴ which means that the insured must be aware of such danger and purposely assume the risk of it.⁵ The burden is on the insurer to show that there was a voluntary exposure. If men of moral responsibility and prudence would regard incurring a risk of danger as being justified, it is not a voluntary exposure to unnecessary danger;⁶ nor is an act performed in the line of duty,⁷ or in an attempt to save life,⁸ unnecessary.

§ 74. Liability, Fidelity, Credit, and Title Insurance. Liability insurance is indemnity against loss by employers for the negligence of their employees or for injury to such employees. As the policy is for the benefit of the employer, an injured employee, not being a party to the

3. *Richards, Ins.* (3d ed.) 539, § 385. Blood poisoning from cutting a corn has been held to be an accident. *Nax v. Travelers' Co.*, 130 Fed. 985. See, also, *Jenkins v. Hawkeye Ass'n* (Iowa), 124 N. W. 199; *French v. Fidelity Co.*, 135 Wis. 259, 17 L. R. A. N. S. 1011.

4. *Richards, Ins.* (3d ed.) 572, § 404. While it has been held that crossing a railroad track at an improper place would be a voluntary exposure to unnecessary danger; *Glass v. Masons' Ass'n*, 112 Fed. 495; crossing a track at a point recognized as a thoroughfare would not be. *Payne v. Fraternal Ass'n*, 119 Iowa, 342; *Lehman v. Great E. Co.* (N. Y.), 7 App. Div. 424.

5. *Richards, Ins.* (3d ed.) 373, § 404.

6. An attempt of a travelling salesman to get upon a train which is already in motion is not, as a matter of law, a voluntary exposure to unnecessary danger. *Fidelity Co. v. Sittig*, 131 Ill. 111, 48 L. R. A. 359.

7. *Freeman v. Travelers' Co.*, 144 Mass. 572; *Bateman v. Travelers' Co.*, 110 Mo. App. 443; *Rustin v. Insurance Co.*, 58 Nebr. 792, 76 Am. St. 136, 46 L. R. A. 253; *Coles v. N. Y. Cas. Co.* (N. Y.), 87 App. Div. 41; *Richards v. Travelers' Co.*, 18 S. Dak. 287, 67 L. R. A. 175; *Continental Co. v. Jennings* (Tex. Civ. App. 1907), 99 S. W. 423; *Pacific Co. v. Snowden*, 58 Fed. 342, 7 C. C. A. 264.

8. *Richards, Ins.* (3d ed.) 574, § 404.

contract, does not have any rights growing out of it, although his claim may fix the liability of the insurer.⁹

Fidelity¹⁰ or guaranty insurance is indemnity against loss consequent upon the dishonesty or default of a designated employee. The provision usually appearing in the policy, that the insured must communicate promptly to the insurer any actual¹¹ knowledge of the employee's dishonesty,¹² does not place the insured under any obligation to watch over the conduct of the employee.¹³

Credit¹⁴ insurance is indemnity against loss resulting from the insolvency of persons to whom credit is extended. Fidelity and credit insurance, in their effect, resemble contracts of suretyship,¹⁵ but differ therefrom in form. A suretyship bond is an undertaking to pay a sum of money, with a clause making such bond void if the principal obligor does or does not do specified things, that is, there is an agreement to pay unless, certain things having been done or not having been done, loss or damage does not result; while in a contract of fidelity insurance there is no provision for payment except in the event of loss or damage. In a guaranty the agreement is that another person will perform his contract with the person guarantied, usually the payment of a sum of money. A policy of credit insurance is an agreement against loss from nonpayment by debtors, and is not a direct undertaking that the payment will be made. A

9. Richards, Ins. (3d ed.) 666, § 476.

10. Richards, Ins. (3d ed.) 654, § 468.

11. A suspicion is not sufficient. *American Co. v. Pauly*, 170 U. S. 144, 42 L. ed. 977.

12. *Saint v. Wheeler*, 95 Ala. 362, 36 Am. St. 210; *Capital Co. v. Watson*, 76 Minn. 387, 77 Am. St. 657; *Phillips v. Foxall*, L. R. 7 Q. B. 666.

13. Richards, Ins. (3d ed.) 659, § 472.

14. Richards, Ins. (3d ed.) 662, § 474.

15. *Frost, Guar. Ins.* (2d ed.) 18, § 3. In suretyship the absence of a default is a subsequent contingency, avoiding liability; in fidelity insurance, a default is a precedent contingency, creating liability.

contract may be one of insurance though called by another name.¹⁶

Insurance of titles to real estate is really a warranty, as it is designed to save the insured harmless from any loss through defects, liens or incumbrances existing at the time the insured acquires his title. If the title is good at the time the policy is issued, there cannot be any risk on the part of the insurer.¹⁷

16. *Bank of Tarboro v. Fidelity Co.*, 128 N. Car. 366, 33 Am. St. 682; *Tebbets v. Mer. Guar. Co.*, 73 Fed. 95, 19 C. C. A. 281, 38 U. S. App. 431. See, also, *Seaton v. Heath* [1899], 1 Q. B. 782.

17. *Trenton Co. v. Title Co.*, 176 N. Y. 65.

CHAPTER VI

PATENTS, COPYRIGHT, GOODWILL, TRADEMARKS, TRADENAMES AND TRADE SECRETS.

§ 75. **Patents—Definitions.** A Patent is a grant from the government of the right to prevent¹ others from making, using or vending an invention except as authorized² by the grantee. A Patentee is the person who receives a patent; and the written evidence of his right is designated as Letters Patent.³ Letters patent are in the nature of a contract⁴ between the state and the person to whom the right is granted, the consideration for the exclusive right given to the inventor being the benefit⁵ the public is to acquire at the expiration of the grant.

1. A patent does not give an inventor a right to his invention, or a right to make, to use, and to sell specimens of an article invented by him, for he has that right without a patent. It gives him the privilege of preventing others from doing these things. 1 Hopkins, Pat. 1, § 1; Bloomer v. McQuewan, 55 U. S. 539.

2. An Assignee of a patent is a person to whom the entire legal interest, or an undivided part of the entire legal interest in a patent, has been assigned by an instrument in writing. Rules Pr., Pat. Off. 196 (1). A Grantee, in the technical sense as used in patent law, is a person to whom the rights conveyed are confined to a part or parts of the territory of the United States. A licensee is one who receives an interest which does not amount to an assignment or to a grant (1 Hopkins, Pat. 294, § 232); being usually either an exclusive or a concurrent right to make or to sell the article covered by the patent. Royalty is a fixed charge, paid to the owner of a patent right, on each patented article manufactured, used or sold by some authorized person.

3. From the Latin, *litterae patentes* (open letters), so called because they are not sealed up but exposed to open view; and usually are directed or addressed by the state to all subjects, differing from certain other letters directed to particular persons for particular purposes, and closed up and sealed on the outside. 2 Blacks. Comm. 346.

4. Att'y-Gen'l v. Rumford W'ks, 9 Off. Gaz. 1064.

5. Few would care or could afford to devote time and money in experiments and making discoveries if the inventor himself could

§ 76. Source of Patent Law. At common law an inventor did not have any special rights;⁶ hence all rights possessed by him must be derived from the written law. The source of patent law in this country is the Federal Constitution,⁷ which confers upon Congress "the power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." By act of Congress,⁸ "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter or any new and useful improvement thereof," may obtain a patent therefor. Designs⁹ also are patentable.

§ 77. Essentials to Patentability—Originality. For a thing to be the subject of a patent there are three requisites, namely, it must be invention, it must be new and it must be useful. Any one of these, or any two combined, would not be sufficient; all three must co-exist. The mere substitution of an equivalent for a part of a process, machine, manufacture or composition of matter, or a combination of old devices,¹⁰ is not invention; nor is it invention to use an old process,¹¹ machine,¹² manufacture,¹³ composition of matter¹⁴ or design,¹⁵ for a new and analogous purpose,¹⁶ this being known as a "double

not reap any benefit therefrom, and the public thus would be the losers by never having the advantages of improvements in the arts and sciences.

6. 1 Hopkins, Pat. 7, § 3.

7. U. S. Const., Art. I, § 8.

8. U. S. Rev. St., § 4886.

9. U. S. Rev. St., § 4929.

10. *Stimson v. Woodman*, 77 U. S. 117.

11. *King v. Gallow*, 109 U. S. 99.

12. *Mast v. Stover Co.*, 177 U. S. 485.

13. *Ansonia Co. v. Electrical Co.*, 144 U. S. 13.

14. *Browning v. Colorado Co.*, 61 Fed. 845.

15. *Smith v. Saddle Co.*, 148 U. S. 679.

16. *Bean v. Smallwood*, 2 Story, 408.

use." Thus, an apparatus for preserving fish and other articles by means of a freezing mixture not having any contact with the atmosphere of the preserving chamber, is but a double use of the widely known ice-cream freezer, and not invention.¹⁷

§ 78. Patentability—Novelty. Anything to be patentable must be new ¹ but something known and used in a foreign country may be the subject of a patent in the United States, provided it has not been patented in a foreign country or described in any printed publication before its invention in this country.²

§ 79. Patentability—Utility. The third requisite of patentability is that the thing for which a patent is desired, must be useful, that is, it must produce a good result.³ A manufacture does not lack utility because it does not accomplish any other purpose than to decorate;⁴ but anything which does not have any other uses

17. *Brown v. Piper*, 91 U. S. 37.

1. *1 Hopkins*, Pat. 247, § 181. The fact that an inventor believes himself to be the first inventor will not be sufficient to entitle him to a patent. *Derby v. Thompson*, 146 U. S. 476.

2. This does not mean that a person having private knowledge of something known and used in a foreign country, but unknown in this, can obtain a patent therefor in the United States; but means that an actual inventor in this country, ignorant of the existence of the thing in a foreign country, will not be prejudiced by such prior existence; as it has not been described in a printed publication, the presumption of having borrowed his ideas does not exist.

3. *1 Hopkins*, Pat. 356, § 292. A patent granted for something which will not answer the purpose for which it was intended, without some addition, adjustment or alteration, is void. *Burrall v. Jewett*, 2 Paige, 143; *Bliss v. Brooklyn*, 10 Blatchf. 522. A spark arrester to be applied to a locomotive lacks utility if it seriously retards the locomotive; though utility is not negated by the fact that an invention is susceptible of improvement. *1 Hopkins*, Pat. 362, § 302; *Wheeler v. Reaper Co.*, 10 Blatchf. 189.

4. *1 Hopkins*, Pat. 358, § 295; *Magic Co. v. Douglas*, 2 Fish. Pat. Cas. 330.

than those which are injurious to morals, to health, or to the good order of society, lacks utility.⁵

§ 80. Abandonment of Invention. An inventor may abandon his invention to the public;⁶ and such abandonment may be either actual or constructive, being actual when it is the result of intention, as where the inventor makes an express declaration to that effect;⁷ and constructive when it results from statute regardless of the intention of the inventor. A patent is void if the invention covered thereby was in public use or on sale in this country earlier than two years⁸ before the first filing of the application, a use being public if there was a transfer of the thing from the inventor to the user without any reservation of control, or any expectation of making a change in it, or any restriction.⁹ A "public" use may result from the use of a single specimen¹⁰ known to but one person,¹¹ and although it is an article which, in its ordinary use, is not seen by the public eye. If, however, the nature of the invention requires placing it in the hands of others for crucial experiment, specimens may be sold for that purpose without jeopardizing the rights of the inventor.¹² Constructive abandonment may result if the inventor does not make his application until more than two years after some other person, not in privity with him, receives a patent on the same subject in some country; or until more than two years after that subject was described in some printed publication somewhere.¹³

5. 1 Hopkins, Pat. 353, § 297; *Bedford v. Hunt*, 1 Mason, 301.

6. 1 Hopkins, Pat. 147, § 79.

7. *Kendall v. Winsor*, 62 U. S. 328.

8. U. S. Rev. St., § 4886; 29 St. at Large, 692, ch. 391.

9. *Root v. Third Co.*, 146 U. S. 221.

10. *Consolidated Co. v. Wright*, 94 U. S. 94.

11. *International Co. v. Gaylord*, 140 U. S. 53.

12. *Graham v. Mfg. Co.*, 11 Fed. 142.

13. U. S. Rev. St., § 4886.

§ 81. Application for Patent. An inventor, desiring a patent, makes an application to the Commissioner of Patents. The description of the invention must be full, clear, concise and exact enough to enable any person ordinarily¹ skilled in the art or science to which it appertains or with which it is connected most nearly, to make and to use the invention, if a machine or manufacture; or to compound the invention if it is a composition of matter; or to perform the invention, if it is an art or process;² or to identify the invention if it is a design, which can be done by reference to a drawing annexed.³ That part of the application known as the "claim" particularly points out the part, improvement, or combination which is claimed as an invention, a distinct and formal claim being necessary, as a patent does not grant any exclusive right except to what distinctly is claimed.⁴ Letters patent may be valid as to one or more claims, and invalid as to one or more of the others.⁵

The fee due with the application for a patent for a process, machine, manufacture or composition of matter is fifteen dollars; and the final fee for issuing the patent is twenty dollars.⁶ Fees for design patents vary with the length of the term of the patent applied for.⁷ Drawings are required in all cases where the invention admits such representation;⁸ but models are not required unless the Commissioner calls for them. Generally, specimens of composition of matter are required, sufficient in quantity for the purpose of experiment.⁹

1. 1 Hopkins, Pat. 95, § 48.

2. U. S. Rev. St., § 4888; O'Reilly v. Morse, 56 U. S. 62.

3. Dobson v. Dornan, 118 U. S. 14.

4. McClain v. Ortmyer, 141 U. S. 424, 35 L. ed. 800.

5. Russell v. Place, 94 U. S. 606.

6. Rules Pr. Pat. Ofs., § 203.

7. For a term of 3 years and 6 months, the fee is \$10; for 7 years, \$15; and for 14 years, \$30. U. S. Rev. St., § 4934.

8. U. S. Rev. St., § 4889.

9. U. S. Rev. St. § 4890; Rules Pr. Pat. Ofs., § 62.

P. P.—7

§ 82. **Rights of Patentee.** A patent is property;¹ and its duration is seventeen years² from the date of issue.³ Design patents are granted for fourteen years, for seven years, or for three years and six months as the applicant may elect.⁴ The government does not have any more right than a private citizen to make, use or sell a patented invention;⁵ and a patentee, if he please, may refrain⁶ from making, using or selling his invention, and may decline to allow others to do so.⁷

§ 83. **Transfers of Patent Rights.** After title has been acquired by a patentee, it is transferable; but recording in the Patent Office within three calendar months¹ after delivery² is necessary to the validity of an assignment or of a grant of a patent by the act of the parties as against any subsequent purchaser or mortgagee for a valuable consideration³ without notice.⁴

A license may be restricted to certain parts of the United States⁵ and to a limited time,⁶ and it may be sub-

1. 1 Hopkins, Pat. 9, § 5.

2. U. S. Rev. St., § 4884; 16 St. at Large, 198, § 22 (July 8, 1870). Congress has power to extend a patent either before or after its expiration. Fire Exting. Case, 21 Fed. 42. This power, however, is not exercised.

3. Rein v. Clayton, 37 Fed. 355.

4. U. S. Rev. St., § 4931; 1 Hopkins, Pat. 34, § 20.

5. U. S. v. Burns, 79 U. S. 252.

6. Connolly v. Union Co., 184 U. S. 546, 46 L. ed. 648.

7. Good v. Deland, 121 N. Y. 8; Rowley v. Koeber, 135 Fed. 363.

1. An innocent purchaser for value without notice within three months after the date of the assignment is not protected. Gibson v. Cook, 2 Blatchf. 144.

2. Dyer v. Rich, 42 Mass. 180.

3. Saxton v. Aultman, 15 Ohio St. 471.

4. U. S. Rev. St., § 4898; Rules Pr. Pat. Ofs., § 197; Peck v. Bacon, 18 Conn. 377; Ashcroft v. Walworth, 1 Holmes, 152.

A license need not be recorded. Ft. Wayne Co. v. Haberkorn, 1 Ind. App. 481; Buss v. Putney, 38 N. H. 44; Brooks v. Byam, 2 Story, 525. A person acquiring an interest in a patent takes it subject to all outstanding licenses. Pratt v. Wilcox Co., 64 Fed. 592.

5. Dorsey Co. v. Mfg. Co., 12 Blatch. 204.

6. 1 Hopkins, Pat. 299, § 239; Mitchell v. Hawley, 83 U. S. 544.

ject to other restrictions.⁷ Being personal, it is not assignable⁸ unless it contain appropriate words, such as "assigns," showing that it was intended to be assignable. The owner of an undivided interest in a patent may exercise his right to any extent he pleases without the consent of any co-owner, provided there is no contract to the contrary. He may make, use, and sell specimens; and may license others,⁹ a license from one of several owners being as good as if given by all of them; and if a license is given by one co-owner the others cannot recover any profits from him¹⁰ or from his licensee.¹¹

§ 84. Infringement of Patents. Infringement is a violation of any of the rights acquired through or under letters patent. An addition to a patented machine or manufacture does not enable him who makes, uses or sells the patented thing with the addition, to avoid the charge of infringement;¹ though the omission of one ingredient of a combination covered by any claim of the patent, averts any charge of infringement based on that claim.² The substitution of an equivalent for any ingredient of a combination covered by any claim of a patent, is an infringement.³ Omission of one or more of the ingredients of a patented composition of matter avoids

7. *Victor Co. v. Fair*, 123 Fed. 424. There may be a restriction that the licensee shall not sell under a certain price. *Bement v. National Co.*, 186 U. S. 70, 46 L. ed. 1058.

8. *Troy Co. v. Corning*, 55 U. S. 193.

9. *Clum v. Brewer*, 2 Curt. 523.

10. *Vose v. Singer*, 86 Mass. 232; *De Witt v. Mfg. Co.*, 5 Hun, 301; *Blackledge v. Weir Co.*, 108 Fed. 71.

11. *Dunham v. Railroad Co.*, 7 Biss. 223.

1. *Western Co. v. LaRue*, 139 U. S. 607.

2. *Black D. Co. v. Excelsior Co.*, 156 U. S. 617. A combination is an entirety, and every part is presumed conclusively to be material. *Hubbell v. U. S.*, 179 U. S. 82.

3. *O'Reilly v. Morse*, 56 U. S. 62. An equivalent is something which performs the same functions in substantially the same way. 1 *Hopkins, Pat. 346, § 272*.

infringement.⁴ A substituted ingredient may perform the required function better than the patented ingredient, and may perform that function in a somewhat different manner, and still constitute an infringement.⁵ A design patent is infringed by any design which, to general observers interested in the subject or to purchasers of things of similar design, has the same appearance as that of the design covered by the patent,⁶ though close analysis might disclose lack of identity. The Courts of the United States,⁷ and the Supreme Court of the District of Columbia⁸ have jurisdiction of all suits arising under the patent laws, the state courts not having any jurisdiction.⁹

§ 85. Copyright—Definition—Kinds. A Copyright¹ is the right to prevent others from multiplying, publishing, and disposing of copies of an intellectual production. Copyrights are classified as common law and statutory.² A common law copyright relates to unpublished work only, and exists independent of statute.³ A statutory copyright exists by virtue of a statute alone,

4. 1 Hopkins, Pat. 343, § 275.

5. A compound of nitro-glycerine and infusorial earth, making dynamite, is infringed by a mixture of nitro-glycerine and mica scales, called mica powder, although the latter was superior to dynamite because the mica carried the nitro-glycerine upon its surface and did not absorb it. *Atlantic Co. v. Mowbray*, 2 Ban. & A. 447.

6. *Gorham v. White*, 81 U. S. 528.

7. U. S. Rev. St., § 629.

8. *Cochrane v. Deener*, 94 U. S. 782.

9. 1 Hopkins, Pat. 760, § 515. Actions in regard to contracts between private persons relevant to patent rights can be brought in the state courts. *Wulson v. Sanford*, 51 U. S. 101.

1. A copyright is personal property; *F. W. Dodge Co. v. Construction Co.*, 183 Mass. 62, 97 Am. St. 412, 60 L. R. A. 810; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; and is obtained by "occupancy." 2 Blacks. Comm. 405.

2. *State v. State Co.*, 77 Nebr. 752, 9 L. R. A. N. S. 174.

3. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480, aff'd 40 How Pr. 293, 2 Sweeny (32 N. Y. Super.) 530, 3 Alb. Law J. 34. See Act of March 4, 1909, § 2.

and is not affected by subsequent publication of the work. Usually when the word "copyright" is used, a statutory copyright is meant.

§ 86. **Common Law Copyright.** As to works which have been composed but have not been published, the common law gives protection to the author against reproduction or interference of any kind,⁴ this right continuing perpetually unless abandoned by publication,⁵ after which it is the right of anyone to print and to sell the work.⁶ A play performed on the stage is not such a publication as will deprive the proprietor of his common law right in the manuscript.⁷

Unpublished work will be protected⁸ as against one wrongfully⁹ or surreptitiously¹⁰ obtaining possession thereof, and he will be enjoined¹¹ from using or disclosing it to others. State courts¹² have jurisdiction of suits involving common law copyright. Unauthorized publication will not operate to forfeit the common law right,¹³ a *bona fide* purchaser for value not obtaining any better

4. *Prince Albert v. Strange*, 1 Macn. & G. 25, 1 Hall & T. 1, 18 L. J. Ch. 120, 13 Jur. 109.

5. *Frohman v. Harris* (Ill.), 87 N. E. 326; *Keene v. Kimball*, 82 Mass. 545, 77 Am. Dec. 426; *Oertel v. Wood*, 40 How. Pr. 10; *Holmes v. Hurst*, 174 U. S. 82; *Donaldson v. Becket*, 2 Bro. P. C. 129, 4 Burr. 2408.

6. *State v. State Co.*, 75 Nebr. 275, 9 L. R. A. N. S. 174; *Mifflin v. Dutton*, 107 Fed. 708.

7. *Tompkins v. Halleck*, 133 Mass. 12, 43 Am. Rep. 480, overruling *Keene v. Kimball*, 82 Mass. 545; 77 Am. Dec. 426; *Macklin v. Richardson*, Ambl. 694.

8. *Keene v. Kimball*, 82 Mass. 545, 77 Am. Dec. 426; *Daly v. Walrath*, (N. Y.) 40 App. Div. 220; *Wheaton v. Peters*, 33 U. S. 591.

9. *Simmons Co. v. Waibel*, 1 S. Dak. 488, 36 Am. St. 755, 11 L. R. A. 267.

10. *Jones v. Thorne*, 1 N. Y. Leg. Obs. 408.

11. *F. W. Dodge Co. v. Construction Co.*, 183 Mass. 62, 97 Am. St. 412, 60 L. R. A. 810; *Oertel v. Wood*, 40 How. Pr. 10.

12. *Drone, Copyr.* 110; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

13. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Boudcault v. Wood*, 2 Biss. 34.

title than the original pirate.¹⁴ The common law right is assignable.¹⁵

§ 87. **Letters.** Letters written by one person to another, whether on business or for friendship, are the literary property¹ of the writer,² who has the exclusive right of publishing³ them. The recipient has property in the material upon which a letter is written,⁴ which gives him the right to its possession and control. He is not obliged to deliver it to the writer; nor is the recipient obliged to preserve the letter, but he may destroy it.⁵ A letter written by an agent is the property of his principal, who has the right to publish it,⁶ the agent not being regarded as the writer in a legal sense.

From a legal standpoint there is literary merit in every letter, however trivial it may be, and however defective it may be in sense, grammar, or orthography. The fact that the writer originally did not have any intention of publishing it, is not a test of literary merit.⁷

14. *Prince Albert v. Strange*, 2 De G. & Sm. 652, 13 Jur. 45, 507.

15. *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480.

1. Letters pass, as any other personal property, to the personal representatives of the deceased; *Denis v. Leclerc*, 1 La. (1 Mart.) 297, 5 Am. Dec. 712; *Thompson v. Stanhope*, Amb. 737; but they are not assets subject to sale to pay debts or legacies, being similar to the property of an executor in the coffin and shroud. *Eyre v. Higbee*, 35 Barb. 502, 22 How. Pr. 198. In *Grigsby v. Breckenridge*, 65 Ky. 480, 92 Am. Dec., it was held that a surviving husband could not recover private letters given by his wife to a daughter of the first husband of the wife, although some of them were written by the surviving husband.

2. *Folsom v. Marsh*, 2 Story, 100.

3. *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 5 N. Y. Ch. 917; *Phillip v. Pennell*, [1907] 2 Ch. 577, 76 L. J. Ch. 663, 97 L. T. 386, 23 T. L. R. 718, 51 S. J. 719.

4. *Dock v. Dock*, 180 Pa. St. 14, 57 Am. St. 617; *Oliver v. Oliver*, 11 Cl. B. N. S. 139, 8 Jur. N. S. 512.

5. *Grigsby v. Breckenridge*, 65 Ky. 480, 92 Am. Dec. 509.

6. *Drone, Copyr.* 132; *Howard v. Gunn*, 32 Beav. 462.

7. From such a standpoint the plays of Shakspeare would not be literary compositions. Whether a letter possessed literary merit or

Publication of letters is circulation thereof before the public by printing or by multiplying copies. The recipient may re-read letters, or read them to a friend, or may deposit them for safe keeping, without violating the rights of the author;⁸ and letters may be published against the will of the writer when done in good faith for the purpose of vindication of character.⁹

§ 88. Works of Art. Property exists in an oil painting, the artist having the same rights as the author of a book; and this common law property is assignable.¹⁰ A painting is not dedicated to the public by being circulated from hand to hand, nor by exhibiting it to thousands; but making a photograph of a picture is an infringement.¹¹ A person has a property right in the use of his portrait for advertising purposes.¹²

§ 89. Statutory Copyright—Origin. The fact that, under the common law, publication destroys an author's exclusive rights in his work, has led to the enactment of statutes for his protection; and in this country the author's right against infringement after publication rests entirely upon such statutes.¹ In Art. I, section VIII, paragraph 8, of the Federal Constitution, giving Congress power to legislate in regard to patents, is found the power of Congress to protect authors; and, in the exercise of such power, Congress has passed an act²

not, is a matter of personal opinion. A letter extolled by one as full of interest or of instruction, might be condemned by another as utterly worthless. *Woolsey v. Judd*, 4 Duer. (11 N. Y. Super.) 379, 11 How. Pr. 49; *Drone*, Copyr. 132.

8. *Grigsby v. Breckenridge*, 65 Ky. 480, 92 Am. Dec. 509.

9. *Perceval v. Phipps*, 2 Ves. & B. 19.

10. *Parton v. Prang*, 3 Cliff. 537, 7 Am. Law Rev. 357.

11. *Oertel v. Wood*, 40 How. Pr. 10.

12. *Edison v. Edison Co.* (N. J. Ch.), 67 Atl. 392.

1. *Stern v. Rosey*, 17 App. D. C. 562, 29 Wash. Law Rep. 159. A statutory copyright obtained after a prior publication is not valid.

2. Act of March 4, 1909, in force July 1, 1909.

extending protection to books, periodicals, lectures, dramatic and musical compositions, maps, and works of art.

§ 90. **Statutory Copyright—Requisites.** To acquire a copyright in this country which will survive subsequent publication, a work must fulfill the following conditions: it must be original; it must be innocent; ³ the author must be a citizen of the United States, or an alien domiciled in the United States, or a citizen of a foreign country which permits the citizens of the United States the benefit of copyright, or which is a party to an international agreement providing for reciprocity in the granting of copyright; ⁴ and it must have undergone compliance with the formalities prescribed by the statute of the United States.

Originality, as a requisite of copyright, may be either in the composition, or in the arrangement ⁵ of material open to all mankind; and means that it must not have been copied from some work already in existence.⁶ While a patent will be granted to the first inventor only, there may be two copyrights for the same creation if the second author, artist, or composer, working independently, has produced identically the same result.⁷

3. *Keene v. Kimball*, 82 Mass. 549; *Shook v. Daly*, 49 How. Pr. 366; *Broder v. Zeno*, 88 Fed. 74; *Stockdale v. Onwhyn*, 5 B. & C. 173.

4. Act of March 4, 1909, § 8.

5. See Act of March 4, 1909, § 6. A person may be an author although having numerous employees working for him, as in the case of the compiler of a dictionary. Act of March 4, 1909, § 62.

6. The contents of a book do not require to be entirely new; if partially old, the copyright will extend to the new material or to the new arrangement. *Mead v. West*, 80 Fed. 380.

7. *Brightley v. Littleton*, 37 Fed. 103; *Walter v. Lane*, [1900] A. C. 539. Such would be the case with law-books; *Mead v. West*, 80 Fed. 380; school-books; *Emerson v. Davies*, 3 Story, 768; maps; *Blunt v. Patten*, 2 Paine, 397; *Matthewson v. Stockdale*, 12 Ves. 270; biographies; *Gilmore v. Anderson*, 38 Fed. 846; translations and photographs. The right secured by the Copyright Act is not a right

§ 91. Statutory Copyright—Formalities. To secure a copyright for works reproduced in copies for sale, the necessary steps are to publish the work with the copyright notice,⁸ which may be "Copyright,⁹ [year of publication] by [name of copyright proprietor]," on the title-page or upon the page immediately following;¹⁰ promptly after publication to send to the Copyright Office, Library of Congress, Washington, D. C., two copies of the best edition of the work;¹¹ and in case of books, to accompany such copies by an affidavit¹² stating that the typesetting, printing and binding have been performed within the United States,¹³ giving the place where and the establishments in which such work was performed, and the date of the completion of the book, or the date of publication, which is the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed.¹⁴ For works not reproduced in copies for sale,¹⁵ a copyright may be secured by depositing in the Copyright Office, with claim of copyright, one complete copy of such work; or in case

to the use of certain words, because they are common property; but it is to that arrangement of words which the author has selected to express his ideas. *Holmes v. Hurst*, 174 U. S. 82, 43 L. ed. 904.

8. Omission of the notice from a particular copy or copies will not invalidate the copyright; but prevents the recovery of damages against an innocent infringer who has been misled by the omission of the notice. Act of March 4, 1909, § 20.

9. This may be abbreviated to "Copr." On maps, works of art, drawings, photographs, or prints, it may consist of the letter C inclosed within a circle. Act of March 4, 1909, § 18.

10. Act of March 4, 1909, § 19.

11. Act of March 4, 1909, § 12.

12. Act of March 4, 1909, § 16.

13. This does not apply to lithographs or photo-engravings where the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; nor to works in raised characters for the use of the blind; nor to books of foreign origin in a language or languages other than English, Act of March 4, 1909, § 15.

14. Act of March 4, 1909, § 62.

15. Act of March 4, 1909, § 11.

of works of art, a photograph or other identifying reproduction thereof.

§ 92. **Statutory Copyright—Rights Under.** Copyrights are granted for a term of twenty-eight years from the date of the first publication, with a further term of twenty-eight years if application for such renewal and extension is made within one year prior to the expiration of the original term.¹⁶ Statutory copyrights may be assigned¹⁷ or mortgaged by an instrument in writing, or they may be bequeathed by will;²⁰ and upon the death²¹ or bankruptcy²² of the owner, they pass as any other personal property.

§ 93. **Statutory Copyright—Infringement.** To constitute infringement it is not necessary that the copying be literal or that a large portion of the work be taken;²³ and it may be by printing, publishing, copying, selling, translating or dramatizing.²⁴ The United States Courts have exclusive jurisdiction of all cases arising under the copyright laws.²⁵

16. Act of March 4, 1909, § 23. After a copyright expires anyone can reprint the work; as in the case of Webster's Dictionary. Merriam v. Holloway, 43 Fed. 450.

17. Every assignment, to be valid as against any subsequent assignee or mortgagee for a consideration without notice, must be recorded in the Copyright Office within three calendar months after its execution in the United States; or within six calendar months if executed without the United States. Act of March 4, 1909, § 44.

20. Act of March 4, 1909, § 42.

21. Latour v. Bland, 2 Stark. 382.

22. Bankruptcy Act of July 1, 1898, § 70 a.

23. Lawrence v. Dana, 4 Cliff. 1. A map may be infringed by taking the boundaries therefrom. Sanborn v. Dakin, 39 Fed. 266. Taking a single scene from a drama may constitute an infringement. Daly v. Palmer, 6 Blatchf. 256, 8 Am. Law Reg. N. S. 236, 3 Am. Law Rev. 453.

24. Act of March 4, 1909, § 1 (a). An infringer is liable not only in damages under Act of March 4, 1909, § 25 (b), but if he has acted wilfully he is liable criminally. Act of March 4, 1909, § 28.

25. Act of March 4, 1909, § 34.

A dramatic work is infringed by taking the plot, characters, scenes, or situations,²⁶ or by novelizing it,²⁷ without the consent of the proprietor. Taking moving pictures of a drama is not of itself an infringement of the copyright; but when the film is placed on an exhibiting machine, which reproduces the motions of the actors, it becomes a dramatization itself, and is an infringement.²⁸ A composition of music is infringed by taking the melody,²⁹ or by performing it publicly for profit.³⁰

§ 94. **Unfair Competition.** Unfair competition¹ consists in passing off one's goods as the goods of another, or in otherwise securing patronage that should go to another, by false representations that lead the patron to believe that he is patronizing the other person.² Out of the doctrine of unfair trade arises many rights involving property, which will be treated together under this head.

§ 95. **Goodwill.** Goodwill is the advantage attaching to the name or device of a person or persons, or to the name of a publication, or to a locality, by reason of the fact that a portion of the public, owing to satisfaction with such person or persons, publication, or locality, or owing to conservatism, or to a dislike for other persons, places or publications, or for two or more of these reasons, will continue to give patronage³ to such person

26. *Goldmark v. Kreling*, 35 Fed. 661.

27. Act of March 4, 1909, § 1 (b).

28. *Harper v. Kalem Co.*, 169 Fed. 61.

29. *Jollie v. Jacques*, 1 Blatchf. 618; *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288, 4 L. J. Exch. 21.

30. The reproduction or rendition of a musical composition by or upon coin-operated machines is not a public performance for profit unless a fee is charged for admission to the place where such a reproduction or rendition occurs. Act of March 4, 1909, § 1 (e).

1. What is known as "unfair competition" in the United States, is designated as "passing off" in England. *Hopkins, Tradem.* (2d ed.) 44.

2. *Hopkins, Tradem.* (2d ed.) 1.

3. *Haugen v. Sundseth*, (Minn. 1908) 118 N. W. 666.

or persons, device, publication or locality. Goodwill may be either personal or local, or it may be a combination of the two. Personal goodwill results from honesty, punctuality, courtesy, truthfulness, ability, financial standing, and the like, or from lack of these in competitors. Local goodwill results from advantages, natural or artificial or both. A location upon a water front⁴ would be an illustration of local goodwill resulting from natural advantages. The erection of a suitable building or structure with its proper mechanical equipment would be an illustration of local goodwill arising from artificial advantages. Goodwill, if personal, survives changes in locality; but if local, it survives changes of ownership, even though the former owners may engage in a like business elsewhere. Goodwill may be created in connection with any business enterprise, occupation, or profession.⁵

Goodwill is intangible property;⁶ it may be independent of all tangible property, as in the case of a publication,⁷ and the most valuable⁸ part of the business.⁹ It is a subject of sale,¹⁰ mortgage,¹¹ or bequest; passes as other property on the death of its owner; and may be taxable.¹² The vendor of the goodwill of a business, unless he has agreed otherwise, may re-engage in a com-

4. Hopkins, Tradem. (2d ed.) 185.

5. Hopkins, Tradem. (2d ed.) 189.

6. Fox Co. v. Glynn, 191 Mass. 344, 9 L. R. A. N. S. 1096; Metropolitan B'k v. St. Louis Co., 36 Fed. 722.

7. Boon v. Moss, 70 N. Y. 465.

8. Weinstock v. Marks, 109 Cal. 529, 50 Am. St. 57, 30 L. R. A. 182.

9. Hopkins, Tradem. (2d ed.) 192.

10. Wilmer v. Thomas, 74 Md. 485, 13 L. R. A. 380; Haugen v. Sundseth (Minn. 1908), 118 N. W. 666; Brass W'ks v. Payne, 50 Ohio St. 115, 19 L. R. A. 82; Le Page Co. v. Russia Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

11. Hopkins, Tradem. (2d ed.) 191.

12. Hopkins, Tradem. (2d ed.) 192; People v. Roberts, 159 N. Y.

petitive business,¹³ though he does not have the right to hold himself out as continuing the business which he sold.¹⁴

§ 96. **Trademarks—Definition.** A Trademark is a mark by which a person, engaged in business, distinguishes his manufactures, stock, or labors from those of his competitors, with a view to ready identification therefrom by the public and to gain the advantage of his ability and integrity. It is appurtenant to and the symbol¹ or visible manifestation² of the goodwill of the business in which it is used, the two being inseparable,³ and may be identical with goodwill.⁴

§ 97. **Tradenames.** A Tradename is a word or phrase by which a business enterprise, or a business location, or specific articles of merchandise from a special source, are known by the public, and which, when applied to merchandise, is generic or descriptive, and, hence, not susceptible of appropriation as a technical trademark.⁵ "Uneeda," marked on soda crackers, is a trademark,⁶ being a distinguishing indication of origin and ownership.⁷ "Minnesota Patent Flour" is a tradename, because it would be the medium of fraud if persons producing flour elsewhere than in Minnesota, were permitted to apply it to their flour;⁸ but it is not a trademark, as any person producing patent flour in Minnesota can

13. *Bassett v. Percival*, 87 Mass. 345; *Trego v. Hunt*, 65 L. J. Ch. 1.

14. *Hopkins, Tradem.* (2d ed.) 198; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Hall's App.* 60 Pa. St. 458, 100 Am. Dec. 584; *Knoedler v. Gleanzer*, 55 Fed. 895, 5 C. C. A. 305.

1. *State v. Bishop*, 128 Mo. 373, 29 L. R. A. 200.

2. *Weinstock v. Marks*, 109 Cal. 529.

3. *Hopkins, Tradem.* (2d ed.) 193.

4. *Com. v. Kentucky Co.*, (Ky. 1909) 116 S. W. 766.

5. *Hopkins, Tradem.* (2d ed.) 11.

6. *National Co. v. Baker*, 95 Fed. 135.

7. *Hopkins, Tradem.* (2d ed.) 10.

8. *Pillsbury-Washburn Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386.

use it; nor would "Patent Flour" be even a tradename, as such words could be used of common right. A tradename is a *quasi* trademark, and will be protected.⁹

§ 98. **Trademarks—Resemblances to and Distinctions from Other Rights.** A trademark resembles a patent or a copyright in that it must be original,¹⁰ and its validity depends upon priority; but there are several distinctions. A trademark may be of longer duration¹¹ than a patent or a copyright as the latter two must be limited;¹² a trademark does not relate to invention¹³ as does a patent; a trademark is a common law right,¹⁴ while a patent is purely statutory; a trademark is not confined to a particular jurisdiction¹⁵ as a patent is; and a trademark protects the public as well as the owner,¹⁶ while a patent or copyright protects the owner alone.

§ 99. **Trademarks as Property—Why Protected.** It frequently is said that a trademark is property,¹ or a property right,² or that the right to a trademark is a

9. *Higgins Co. v. Higgins Co.*, 144 N. Y. 462, 43 Am. St. 769.

10. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Hyman v. Sofis Cargar Co.*, 4 Colo. App. 475; *J. R. Watkins Co. v. Sands*, 33 Minn. 326; *Columbia Co. v. Alcorn*, 150 U. S. 460.

11. *Dover Co. v. Fellows*, 163 Mass. 191, 47 Am. St. 443, 28 L. R. A. 448; *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. 575, 13 L. R. A. 343.

12. U. S. Const. Art. I, § VIII, ¶ 8.

13. *Tradem. Cas.* 100 U. S. 82.

14. *Hopkins, Tradem.* (2d ed.) 16; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Sarrazin v. Irby Co.*, 93 Fed. 624, 35 C. C. A. 496.

15. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170.

16. *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. 786, 43 L. R. A. 95.

1. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Bradley v. Norton*, 33 Conn. 157; *Wilmer v. Thomas*, 74 Md. 485, 13 L. R. A. 380; *Coleman v. Crump*, 70 N. Y. 573; *Portuondo Co. v. Portuondo Co.*, (Pa. 1908) 70 Atl. 968.

Goodwill "is in the nature of property." *Brass W'ks v. Payne*, 50 Ohio St. 115, 19 L. R. A. 82.

2. *Correro v. Wright*, (Miss. 1908) 47 So. 379.

property right;³ but to speak of a trademark as property is scarcely accurate, as it cannot exist apart from its use in connection with some business when applied to a vendible commodity.⁴ It is property in a qualified⁵ sense only, and is not taxable, being valuable only as an incident to the business in which used, and may be said to be appurtenant to the goods designated by the mark.⁶ Trademarks are protected for two⁷ reasons, one being to prevent fraud on the public,⁸ and the other to prevent fraud on the owner of the trademark.⁹

§ 100. Trademarks—Of What they May Consist. Any contrivance, design, device,¹ name, symbol or other

2. *Solis Co. v. Pozo*, 16 Colo. 388, 25 Am. St. 279; *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200; *Lawrence Co. v. Tenn. Co.*, 138 U. S. 537; *Hall v. Barrows*, 33 L. J. Ch. 204, 9 L. T. N. S. 561, 10 Jur. N. S. 55, 4 De G. J. & S. 150.

4. *Hopkins, Tradem.* (2d ed.) 20; *Fair v. Morales*, 82 Ill. App. 499; *Avery v. Melkle*, 81 Ky. 73; *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640; *Weston v. Ketcham*, 39 N. Y. 54, 51 How. Pr. 455; *Dixon Co. v. Guggenheim*, 2 Brewst. 321; *Kidd v. Johnson*, 100 U. S. 617; *McAndrew v. Bassett*, 33 L. J. Ch. 566, 10 L. T. N. S. 442, 10 Jur. N. S. 550, 13 W. R. 123, 4 De G. J. & S. 380.

There is no property in a tradename. *Lee v. Haley*, L. R. 5 Ch. App. 155.

5. If the buyer could be given to understand in any other way than by a trademark, that the goods before him are what he seeks, the same result would be attained. *Com. v. Kentucky Co.*, (Ky. 1909) 116 S. W. 766.

6. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170.

7. *Kyle v. Perfection Co.*, 127 Ala. 39, 85 Am. St. 78, 50 L. R. A. 628; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *W. R. Lynn Co. v. Auburn-Lynn Co.*, 100 Me. 461, 4 L. R. A. N. S. 960; *Fox v. Glynn*, 191 Mass. 344, 9 L. R. A. N. S. 1096; *Hoyt v. Hoyt* 143 Pa. St. 623, 24 Am. St. 575, 13 L. R. A. 343.

8. *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 538; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. N. S. 393, 18 Wkly. Rep. 442, 23 L. T. N. S. 443, 18 Wkly. Rep. 562, 22 L. T. N. S. 260.

9. *Skinner v. Oakes*, 10 Mo. App. 45; *American Co. v. Anthony*, 15 R. I. 338, 2 Am. St. 398; *Lawrence Co. v. Tennessee Co.*, 138 U. S. 537.

1. Under § 5 (b) of the Act of February 20, 1905, a trademark will be refused registration if it "consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation

thing may be employed ² as a trademark, with the following exceptions. A generic ³ term cannot be a trademark, a generic term being one too comprehensive in its meaning to be monopolized by an individual in its application to merchandise, and including geographical ⁴ and descriptive ⁵ words used in commerce.

thereof, or of any State, or municipality, or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem;" and the portrait of a living individual cannot be registered as a trademark except by his written consent.

2. The following have been protected as trademarks: "Charter Oak" stoves; *Filley v. Fassett*, 44 Mo. 176, 100 Am. Dec. 275, 8 Am. Law Reg. N. S. 402, *Lawson, Cas. Pers. Prop.*, 284, *Cox, Am. Tradm. Cas.* 530; "Vulcan" matches; *Taendsticksfabriks Antiebolaget Vulcan v. Myers*, 139 N. Y. 364; "Roger Williams" cotton cloth; *Barrows v. Knight*, 6 R. I. 434, *Cox, Am. Tradm. Cas.* 238; "Star" shirts; *Morrison v. Case*, 9 Blatchf. 548; "Trilby" gloves. *Re Holt Tradem. L. R.* (1891) 1 Ch. 711. For additional illustrations, see *Hopkins, Tradem.* (2d ed.) 96.

Generally, a newly coined, arbitrary word is a valid trademark. *Lynn Co. v. Auburn-Lynn Co.*, 100 Me. 461, 4 L. R. A. N. S. 960; *Burnett v. Phalon*, 9 Bosw. (22 N. Y. Supr.) 192; *Fish Co. v. La Belle W. W.*, 82 Wis. 546, 33 Am. St. 72, 16 L. R. A. 453; *Northwestern Co. v. Manser*, 162 Fed. 1004.

3. *Hopkins, Tradem.* (2d ed.) 66.

4. *Hopkins, Tradem.* (2d ed.) 128; *Eggers v. Hink*, 63 Cal. 445, 49 Am. Rep. 96, ("Philadelphia" beer); *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125 ("Moline" plows); *American Co. v. U. S. Watch Co.*, 173 Mass. 85; *Lea v. Wolff*, 46 How. Pr. 157, 15 Abb. Pr. N. S. 1, ("Worcestershire" sauce); *Laughman v. Piper*, 128 Pa. St. 1, 5 L. R. A. 599, ("Sonman" coal); *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. 753, 29 L. R. A. 524, ("United States" dental rooms); *Hoyt v. J. T. Lovett Co.*, 71 Fed. 173, 17 C. C. A. 652, 39 U. S. App. 1, 31 L. R. A. 44, ("Green Mountain" grapes); *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

5. *Spleker v. Lash*, 102 Cal. 38, 36 Pac. 362; *Alden v. Gross*, 25 Mo. App. 123, ("Fruit" vinegar); *Town v. Stetson*, 3 Daly, 53, 4 Abb. Pr. N. S. 218, *Cox, Am. Tradm. Cas.* 514, ("Dessicated" codfish); *Alff v. Radam*, 77 Tex. 530, 19 Am. St. 792, 14 S. W. 164, 9 L. R. A. 145, ("Microbe Killer" antiseptic); *Computing Co. v. Standard Co.*, 118 Fed. 965, 55 C. C. A. 459 ("Computing" scales); *Cellular Co. v. Maxton*, L. R. (1899) A. C. 326, ("Cellular" cloth of cellular construction); *Hopkins, Tradem.* (2d ed.) 83.

Everyone, generally speaking, has a right to use his own name⁶ in business; and, for this reason, a person cannot make a trademark of his own name,⁷ as this would violate one of the essentials of a trademark—that it must be exclusive.⁸ If a person under his own name has built up a business reputation, he cannot prevent another person of the same name going into the same business, even though it results in the latter obtaining advantage of the good reputation of the former,⁹ provided the latter does not use any fraud by representing himself as the former; but a person does not have any right to use the same additions¹⁰ to his name as others have used.

Descriptive¹¹ words are invalid as trademarks. So are words indicating the name, nature, kind, quality, or character of an article¹² as every individual has an equal right to their use; and words on goods indicating

6. *Drake Co. v. Glessner*, 68 Ohio St. 237.

7. *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Lawson, Cas. Pers. Prop.* 290. See Act of February 20, 1905, § 5 (b).

8. *Hopkins, Tradem.* (2d ed.) 138; *Fox v. Glynn*, 191 Mass. 344, 9 L. R. A. N. S. 1096.

9. *Clark v. Clark*, 25 Barb. 76.

10. Such additions are not necessary, and evidently must be used for fraudulent purposes. While Mr. Nolan might use his name, neither he nor he and his brother would have any right to use the firm name of "Nolan Brothers" if there was a prior firm by that name engaged in the same business in the neighborhood. *Nolan Co. v. Nolan*, 131 Cal. 271, 82 Am. St. 346, 53 L. R. A. 384.

11. *Schmidt v. Brieg*, 100 Cal. 672, 22 L. R. A. 790, 792; *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 766; *Watkins v. Landon*, 52 Minn. 389, 38 Am. St. 560, 19 L. R. A. 236; *Barrett Co. v. Stern*, 176 N. Y. 27; *Horlick's Co. v. Elgin Co.*, 120 Fed. 264, 56 C. C. A. 544.

"Fire-Proof Oil" is not a trademark although the name is long used by one person. *Scott v. Standard Co.*, 106 Ala. 475, 31 L. R. A. 374.

12. *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Royal Co. v. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229; *Dreydoppel v. Young*, 14 Phila. 226; *Lawrence Co. v. Tennessee Co.*, 138 U. S. 537, 35 Cal. 52, "Washing Powder" is not a valid trademark. *Falkinburg v. Lucy*, 95 Am. Dec. 76.

quality, not origin, will not mislead,¹³ as a purchaser obtains the quality he sought.

§ 101. **Fraudulent Use of Marks, Names, and Style.** Although many words will not be protected as trademarks because generic, yet their use by a rival will not be allowed if the result would be to mislead the public¹ and be a fraud upon the person who first has used them on his goods. Thus, while a geographical name cannot be a trademark, its use will not be tolerated by another who seeks fraudulently to induce the sale of his goods,² especially if such name is used on goods not manufactured in the locality designated³ and such use is for the purpose of gaining advantage of the reputation which the place may have as being the source of superior articles of the kind manufactured.

So, if a person use his own name,⁴ or that of another,

13. *American Co. v. Anthony*, 15 R. I. 333, 2 Am. St. 898.

1. *Portuondo Co. v. Portuondo Co.* (Pa. 1908) 70 Atl. 968; *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. 763, 29 L. R. A. 524; *Wrigley v. Grove Co.*, 183 Fed. 99.

2. *Collinsplatt v. Finlayson*, 88 Fed. 693. After watches, called "Waltham watches," have been manufactured in Waltham for some time by one manufacturer who has gained a reputation, a subsequent manufacturer at that place would have a right to call his watches "Waltham watches" because manufactured there; but he would not have any right to do so in such a way as might lead the public to suppose that his watches are manufactured by the prior firm. *American Co. v. United States Co.* 173 Mass. 85, 73 Am. St. 263, 43 L. R. A. 826.

3. *El Modello Co. v. Gato*, 25 Fla. 886, 23 Am. St. 537, 6 L. R. A. 823; *Gebbie v. Stitt* (N. Y.), 82 Hun, 93.

4. It does not make any difference that the second person was not actuated by any feeling hostile to the former proprietor, or that he did not have any desire to injure the business of the former. *Chas. S. Higgins Co. v. Higgins Co.* 144 N. Y. 462, 43 Am. St. 769, 27 L. R. A. 42, reversing 71 Hun (78 N. Y. Super.) 101, 24 N. Y. Supp. 801, 54 N. Y. St. 89. Such use of a name is regarded as constructively fraudulent. *Manitowoc Co. v. Numsen*, 93 Fed. 196.

It is not essential that the names be identical, provided they are so nearly alike as to deceive. Thus, "E. H. Gato" and "G. H. Gato" are sufficiently alike that the public might be deceived into thinking them to be the same person. *El Modello Co. v. Gato*, 25 Fla. 886, 23 Am. St.

er,⁵ in a manner calculated to deceive the public into the belief that his goods are the goods of another of that name he will be enjoined from so doing;⁶ and there is no practical difference between corporate,⁷ partnership, or individual names so far as this principle is concerned.⁸ Even descriptive words invalid as a trademark, will not be allowed to be used when such use is intended to represent the goods of one dealer as being those of another,⁹ thereby appropriating the reputation and trade of the latter.¹⁰

§ 102. Trademarks Must Not Be Untrue. A trademark will not be protected if it is untrue,¹¹ unless the

537, 6 L. R. A. 323. "Van Wolf" is an imitation of "Wolfe". *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204.

5. *Hopkins, Tradem.* (2d ed.) 278. Where a drygoods establishment uses the words, "The Golden Lion" upon its signs, the use of such words by a competitor will be restrained. *Walker v. Alley*, 13 Grant Ch. 356.

6. *Hopkins, Tradem.* (2d ed.) 144.

7. *Dodge (b. v. Dodge)*, (Cal.) 78 Pac. 879; *Plant Co. v. Michel Co.*, 23 Mo. App. 579; *Stuart v. Stewart Co.*, 91 Fed. 243, reversing 85 Fed. 778.

A corporation cannot take the name of a prior corporation; *Higgins Co. v. Higgins Co.*, 144 N. Y. 462, 43 Am. St. 769, 27 L. R. A. 42 reversing 71 Hun (78 N. Y. Super. Ct.) 101, 24 N. Y. Supp. 801, 54 N. Y. St. 89; or one resembling it; *Mount Ass'n v. New Ass'n*, 146 Ill. 416; *Benevolent Order v. Improved O. of E.*, 111 N. Y. Supp. 1067; *Re Improved B. & P. O.* (1908), 55 Pitts. Leg. J. 323; *Benevolent O. E. v. Improved O. E.* (Tenn.) 118 S. W. 389; or the name of a trader. *Holmes v. Holmes Co.*, 37 Conn. 278, 9 Am. Rep. 324; *International Co. v. Rogers Corp.* (N. J. Ch. 1904) 57 Atl. 1037; *J. & P. Coats v. Coates Co.*, 135 Fed. 177. These restrictions do not annul the corporation, as it may choose another name. *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. 786, 43 L. R. A. 95.

8. *Hopkins, Tradem.* (2d ed.) 154. Two hotels of the same name in the same town are not allowed. *Hopkins, Tradem.* (2d ed.) 310.

9. Though "Syrup of Figs," being descriptive, might be invalid as a trademark, another person will not be allowed to imitate the form of the manufacturer's device and description so far as to deceive purchasers. *California Co. v. Worden*, 86 Fed. 212, 95 Fed. 132.

10. *Hopkins, Tradem.* (2d ed.) 121.

11. *Hopkins, Tradem.* (2d ed.) 66. Where the mark was "Old Colony Shoe Company, Rockland, Mass." which had been adopted be-

misrepresentation is slight and immaterial¹² or inadvertent.

§ 103. **Trademarks—How Acquired.** A trademark is acquired by use¹ only; and does not depend on statute.² When a trademark has been used long enough so that it is recognized that the maker or seller of the goods to which it is attached, is the originator of the article so marked, it is entitled to protection.³

§ 104. **Trademarks—Registration.** The only valid trademark legislation which can be passed by Congress is under Article I, Section 8, Clause 3, of the Federal Constitution, which gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."⁴ Under this section, Congress, on February 20, 1905, passed an act relating to the registration of trademarks with the Commissioner of Patents, which was amended February 18,

cause Rockland had a reputation for the manufacture of fine shoes, but the shoes offered for sale were not made at Rockland nor was there any such company, relief was refused. *Coleman v. Dannenberg Co.*, 103 Ga. 784, 68 Am. St. 143, 41 L. R. A. 470.

12. *Hopkins, Tradem.* (2d ed.) 68. "Hole-Proof" is boastful and fanciful, not false and misleading. "No one could be misled into the belief that holes will not appear in complainant's socks if they are worn long enough." *Holeproof Co. v. Wallach*, 172 Fed. 859, 97 C. C. A. 263.

1. *Hopkins, Tradem.* (2d ed.) 57. A declaration that a person has adopted and claims a certain trademark, is not sufficient; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; nor is an intention to use it in the future. *Hopkins, Tradem.* (2d ed.) 63. A trademark cannot be acquired by merely using it in advertising. *Hopkins, Tradem.* (2d ed.) 243.

2. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Shaver v. Shaver*, 54 Iowa, 209.

3. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Insurance Co. v. Scott*, 84 La. (83 La. Ann.) 946, 39 Am. Rep. 286. Its use but once might be sufficient in some cases. *Hopkins, Tradem.* (2d ed.) 58. Between conflicting trademarks, priority in use is important. See Act of February 20, 1905, § 7.

4. *Tradem. Cas.* 100 U. S. 82.

1909; but this act does not interfere with common law or equitable remedies for the wrongful use of a trademark,⁵ nor are the rights of third persons affected by registration.⁶ The advantages of registration are that it makes a permanent record of the adoption of the trademark;⁷ and the certificate of registration is *prima facie* evidence of ownership.⁸ Many of the states⁹ have passed statutes in reference to trademarks.

§ 105. Trademarks—Rights of Owner—Transfer. Generally, the acquisition of a trademark carries with it the right to use the mark everywhere;¹ and the duration of a trademark is unlimited as long as it is used.² A trademark is assignable,³ but it cannot be transferred separately⁴ it being essential that the assignee likewise have the right to manufacture or sell the merchandise to which the trademark has been attached.⁵ With an assign-

5. Act of February 20, 1905, § 23.

6. U. S. v. Braun, 39 Fed. 775.

7. Hennessy v. Braunschweiler, 89 Fed. 664.

8. Act of February 20, 1905, § 16.

9. State v. Bishop, 128 Mo. 373, 49 Am. St. 569, 29 L. R. A. 200.

1. Hopkins, Tradem. (2d ed.) 19.

2. Certificates of Registration remain in force for twenty years only, unless renewed in accordance with the Act of February 20, 1905, § 12.

3. Hopkins, Tradem. (2d ed.) 22. Trademarks pass under a general assignment or bankruptcy. Bankruptcy Act of 1898, § 70. Upon the death of the owner of a trademark it passes as any other personal property. Croft v. Day, 7 Beav. 84.

Generally, upon dissolution of a partnership, each partner is entitled to use the trademark of the firm in the absence of any agreement in regard thereto. Young v. Jones, 3 Hughes, 274.

The right to use a tradename is transferable; Frazer v. Frazer Co., 121 Ill. 147, 2 Am. St. 73; Howard v. Park (N. Y.), 21 Am. Law Reg. 644; unless the name depends upon the personal reputation and skill of one person. Messer v. Fadettes, 168 Mass. 140, 60 Am. St. 371, 37 L. R. A. 721.

4. Falk v. American Co., 180 N. Y. 445, 105 Am. St. 778, 1 L. R. A. N. S. 704.

5. Witthaus v. Braun, 44 Md. 303, 22 Am. Rep. 44; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149, Lawson, Cas. Pers. Prop. 313;

ment must go the goodwill;⁶ and with a transfer of the business and the goodwill must go the title to a trademark used therein, though not specially mentioned.⁷

§ 106. **Trademarks—Violation.** A trademark may be violated by infringement or by counterfeiting. Counterfeiting may be by using a forged *fac simile*; or by using genuine trademarks on substituted goods.⁸

What constitutes an infringement is often difficult to be determined; though there cannot be infringement unless the two marks are used upon goods of the same class.⁹ To constitute infringement it is not essential that the imitation be perfect¹⁰ if deception is likely.¹¹

Joseph Dixon Co. v. Guggenheim, 2 Brewst. 321. Otherwise it would be a deception on the public if the assignee were to attach the mark to goods manufactured or sold by himself which were not the same class of goods formerly sold under the trademark.

6. *Goodman v. Meriden Co.*, 50 Conn. 139; *J. G. Mattingly Co. v. Mattingly*, 96 Ky. 430; *Chadwick v. Scovell*, 151 Mass. 190; *Skinner v. Oakes*, 10 Mo. App. 45; *Baldwin v. Von Micheroux*, 25 N. Y. Supp. 857; *Morgan v. Rogers*, 19 Fed. 596; *Smith v. Fair*, 14 Ont. 729; *Leather Co. v. American Co.*, 4 De G. J. & S. 137, 33 L. J. Ch. 199.

7. *Hopkins, Tradem.* (2d ed.), 23. A sale of the visible property only of a business does not carry the title to a trademark used in the business. *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. 786, 43 L. R. A. 95.

8. As by refilling bottles, boxes, or packages bearing the trademarks. *Hopkins, Tradem.* (2d ed.) 260.

9. *Collins Co. v. Ames*, 18 Fed. 561.

10. The following are instances of infringements: "Cyclops Machine Works" is infringed by "Cyclops Iron Works;" *Hainque v. Cyclops Wks.*, 136 Cal. 35; "Wolfe's Schiedam Aromatic Schnapps" by "Wolfe's Aromatic Schiedam Schnapps;" *Wolfe v. Barnett*, 75 La. (24 La. Ann.) 97, 13 Am. Rep. 111; "Golden Crown" by "Golden Chain;" *Parlett v. Guggenheimer*, 67 Md. 542; "Creamalt" by "Crown Malt;" *Fox v. Glynn*, 191 Mass. 344, 9 L. R. A. N. S. 1096; "Charter Oak" in combination with a sprig of oak-leaves, by the use of the words alone; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275, 8 Am. Law Reg. N. S. 402, *Lawson, Cas. on Per. Prop.* 284; "Excelsior" by "Excellent;" *Volger v. Force*, 71 N. Y. Supp. 209; "Gold Dust" by "Gold Drop;" *N. K. Fairbank Co. v. Luckel Co.*, 102 Fed. 327, 42 C. C. A. 376, reversing 88 Fed. 694. For other instances, see *Hopkins, Tradem.* (2d ed.), 283.

11. *Hopkins, Tradem.* (2d ed.), 268. A red Greek cross would

For an infringement of a trademark, damages can be recovered at common law ¹² or the infringement will be enjoined ¹³ perpetually by a court of equity, the latter being the only adequate remedy.¹⁴

§ 107. **Trade Secrets.** A Trade Secret is some recipe or process known to a limited number in a particular business establishment, and whose use therein enables the proprietor thereof to acquire some superiority over his competitors. It does not denote the mere privacy with which an ordinary commercial business is carried on. Trade secrets being property ¹⁵ are subject to taxa-

be infringed by a Maltese cross with a red center. *Johnson v. Bauer*, 82 Fed. 662, 27 C. C. A. 374, reversing 79 Fed. 954.

The charge of infringement is not overcome by the addition of other symbols, words, or initials. *Hopkins, Tradem.* (2d ed.), 290. "Old Mill Soap" would be infringed by "Old Stone Mill Soap." *Swift v. Brenner*, 125 Fed. 826.

A word may infringe a symbol, the word "Columbia" being infringed by a figure of Columbia; *Morgan Co. v. Walton*, 82 Fed. 469; or a symbol may infringe a word. *Hopkins, Tradem.* (2d ed.), 289. A device of an anchor is infringed by the word "Anchross." *Re Thewlis, Tradem.* 10 R. P. C. 369.

A trademark expressing the same idea as another and liable to create confusion, is an infringement. *Hopkins, Tradem.* (2d ed.) 304. "Twanta" is an infringement of "Unceda." *National Co. v. Baker*, 95 Fed. 135.

A trademark is infringed by one having substantially the same sound and pronunciation, "U. C. A." being an infringement of "Yusea." *Welsbach Co. v. Adam*, 107 Fed. 463.

12. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170. See Act of February 20, 1905, § 16.

13. *El Modello Co. v. Gato*, 25 Fla. 886, 23 Am. St. 537, 6 L. R. A. 823; *Correro v. Wright* (Miss. 1908), 47 So. 379; *Johnson v. Seabury* (N. J. 1907), 12 L. R. A. N. S. 1201; *Gillott v. Esterbrook*, 48 N. Y. 374; *Joseph Dixon Co. v. Guggenheim*, 2 Brewst. 321; *Mills Co. v. Eagle*, 86 Fed. 608; *Hogg v. Kirby*, 8 Ves. 215. See Act of February 20, 1905, § 20.

The improper use of tradename will be enjoined. *Frazer v. Frazer Co.*, 121 Ill. 147, 2 Am. St. 73; *Cohen v. Nagle*, 190 Mass. 4, 2 L. R. A. N. S. 964; *Clark v. Clark*, 25 Barb. 76.

14. *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

15. *Peabody v. Norfolk*, 98 Mass. 452; *Champlin v. Stoddart*, 30 Hun, 300.

tion.¹⁶ Their wrongful disclosure will be enjoined;¹⁷ and one obtaining knowledge thereof by unfair means will not be permitted to avail himself of it,¹⁸ though property in a trade secret may be lost though its discovery by fair means.¹⁹

16. Hopkins, Tradem. (2d ed.) 229; *Re Brandreth*, 59 N. Y. Supp. 1092, 28 Misc. 468.

17. *Chaplin v. Stoddart*, 30 Hun, 300; *Lamb v. Evans*, L. R. (1892) 3 Ch. 462.

18. Hopkins, Tradem. (2d ed.) 220; *Salmon v. Hertz*, 40 N. J. Eq. 400; *Little v. Gallus*, 38 N. Y. Supp. 487.

19. *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110, *aff'd* 79 Hun. 183.

CHAPTER VII.

LIMITATIONS ON AND INTERESTS IN PROPERTY.

§ 108. **Ownership—Definition.** Ownership is dominion over things, the right to deal with them in some particular manner to the exclusion of others, to use, to enjoy, and to dispose of them.¹ Ownership has been designated very aptly as a “bundle of rights;”² and is one of the advantages derived from society in exchange for part of the natural liberty resigned by every member thereof.³ Accurately and strictly speaking there is no foundation in nature⁴ for ownership, though the existence of property rights is recognized even where a system of laws has not been adopted.⁵ Ownership is distinct from possession.⁶

§ 109. **Ownership—Limitations.** The right to acquire, use and transfer property is not unlimited. Limitations may arise from the character of the article, from the incapacity of persons, or from public policy. Most things upon the earth can be and are subject to ownership by someone, though there are a few which cannot be owned by anyone; others can be the subject of a partial or temporary ownership only; and even things capable of absolute ownership are subject to certain limitations which will be noticed in this Chapter.

A person has many rights which are not property, such as his right to life and to liberty; but there are

1. *Harvey Co. v. Dillon*, 59 W. Va. 605, 6 L. R. A. N. S. 623.

2. *Campbell, Sales* (2d ed.), 39.

3. 1 Blacks. Comm. 138.

4. 2 Blacks. Comm. 1.

5. *As in the Indian Territory. Garner v. Wright*, 52 Ark. 335, 6 L. R. A. 715.

6. *Morrison v. Semple*, 6 Binn. 94, *Lawson, Cas. Pers. Prop.* 1.

some intangible rights⁷ which resemble property, and it is not always easy to determine whether a right is property or not, in some cases being designated as *quasi* property. The incumbent of a public office,⁸ under our system of government, does not have any property in it, nor in the prospective fees⁹ thereof, so that his removal from office is not depriving him of property. At common law there was no property in a claim for damages for injury to the person,¹⁰ though the rule has been changed in some states by statute;¹¹ but evidence of a right, as a railroad ticket,¹² may be property. Mere abstract knowledge is not of itself property; and a physician is not deprived of property by being required to give his opinion upon facts stated in a hypothetical question while testifying as a witness in court.¹³

§ 110. **Potential Existence.** Present ownership cannot be had in tangible articles to be produced in the future unless they have a "potential" existence. Potential Existence is that possessed by things which, in the course of nature, reasonably may be expected to be produced by something already in existence.¹ The unborn young of animals,² wool to be grown on sheep, butter to

7. See § 99, *ante*, as to Trademarks.

8. *Attorney-Gen'l. v. Jochim*, 99 Mich. 358, 41 Am. St. 606, 23 L. R. A. 699; *State v. Moore*, 56 Nebr. 1; *State v. Hawkins*, 44 Ohio St. 98; *Reals v. Smith*, 8 Wyo. 159.

"The office of an attorney is his property." *Ex parte Steinman*, 95 Pa. St. 220, 40 Am. Rep. 637.

9. *People v. Kipley*, 171 Ill. 44, 41 L. R. A. 775.

10. *Rice v. Stone*, 83 Mass. 566, 1 Gray, Cas. on Prop. 206.

11. See *Cleland v. Anderson*, 66 Nebr. 252, 5 L. R. A. N. S. 136.

12. *Com. v. Parker*, 165 Mass. 526.

13. *Dixon v. People*, 168 Ill. 179, 39 L. R. A. 116.

1. *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, *Pattee, Cas. in Personalty*, 202; *Norris v. Hix*, 74 Iowa, 524; *Dickey v. Waldo*, 97 Mich. 255, 261, 23 L. R. A. 449; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Robinson v. Ezzell*, 72 N. Car. 231.

2. *Andrews v. Cox*, 42 Ark. 373; *Hull v. Hull*, 48 Conn. 250, 41 Am. Rep. 165, *Griffin, Cas. on Pers. Prop.* 71; *Holt v. Lucas*, 77 Kans

be manufactured from cows, and future crops have a potential existence, so that a present sale or mortgage³ can be made of them, and the buyer or the mortgagee could insist on delivery of the specific articles and would not be restricted to a claim for damages for failure to deliver. It is essential, however, that there be present ownership of whatever is expected to produce the future articles.⁴ While a person may have present ownership of wool that is to be grown upon sheep he now owns, and can make a present disposition of such wool, he does not have present ownership of wool upon sheep he may be about to buy,⁵ and ultimately does buy. Likewise, a person does not have present ownership of crops to be grown, unless he has a present interest⁶ in the land on which they are to be grown, though it is sufficient if his interest in the land is that of a lessee⁷ only. In a few states future crops do not have a potential existence except those to be raised during the next succeeding year;⁸ but in other states this limitation does not exist.⁹ In some

710, 17 L. R. A. N. S. 203; *Sawyer v. Gerrish*, 70 Me. 254; *Moore v. Bynum*, 10 S. Car. 452, 30 Am. Rep. 58.

3. 1 Andrews, Am. Law, 907.

4. *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165, *Griffin, Cas. on Pers. Prop.* 71; *Low v. Pew*, 108 Mass. 347, *Pattee, Illus. Cas. on Sales*, 205.

5. *Grantham v. Hawley*, Hob. 132.

6. *Woolsey v. Jones*, 84 Ala. 88; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, *Pattee, Cas. in Personalty*, 202; *Stephens v. Tucker*, 55 Ga. 543, 58 Ga. 391; *Miller v. McCormick Co.*, 35 Minn. 399; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Conderman v. Smith*, 41 Barb. 404; *Cotten v. Willoughby*, 83 N. Car. 75; *Moore v. Byrum*, 10 S. Car. 452, 30 Am. Rep. 58; *Watkins v. Wyatt*, 56 Tenn. (9 Baxt.) 250, 40 Am. Rep. 90; *Cook v. Steel*, 42 Tex. 53.

7. *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, *Pattee, Cas. in Personalty*, 202; *Headrick v. Brattain*, 63 Ind. 438.

8. *Smith v. Coor*, 104 N. Car. 139.

9. *Thrash v. Bennett*, 57 Ala. 156; *Robinson v. Kruse*, 29 Ark. 575; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718, *Pattee, Cas. in Personalty*, 202; *Headrick v. Brattain*, 63 Ind. 438; *Pennington v. Jones*, 57 Iowa, 37; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682;

states crops do not have a potential existence until the seed is sown.¹⁰

§ 111. **Human Bodies.** A human body, living¹¹ or dead,¹² is not the subject of property; therefore a dead human body cannot be inherited,¹³ nor is it a subject of larceny,¹⁴ or of a gift *causa mortis*.¹⁵ The body of a deceased person does not form a part of his estate;¹⁶ nor can a man by will dispose of that which, after his death, will be his corpse.¹⁷

A dead human body, however, is said to be *quasi*¹⁸ property, which means that certain persons have rights¹⁹

Smith v. Atkins, 18 Vt. 465; Petch v. Tutin, 15 L. J. Exch. 280, 15 M. & W. 110.

10. Patapsco Co. v. Ballard, 107 Ala. 710, 54 Am. St. 181; Apperson v. Moore, 30 Ark. 56, 21 Am. Rep. 170; Crine v. Tifts, 65 Ga. 644; Hansen v. Dennison, 7 Ill. App. 73; Hutchinson v. Ford, 72 Ky. 318, 15 Am. Rep. 711; Long v. Hines, 40 Kans. 220; Bryant v. Pennell, 61 Me. 108; Cole v. Kerr, 19 Nebr. 553; Cudworth v. Scott, 41 N. H. 456; Rochester Co. v. Rasey, 142 N. Y. 570, 40 Am. St. 635, 39 Cent. Law J. 71; Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614; Lamson v. Mofat, 61 Wis. 153; Holroyd v. Marshall, 10 H. L. Cas. 191.

11. U. S. Const., Amend. XIII.

12. Bessemer Co. v. Jenkins, 111 Ala. 135, 146, 56 Am. St. 26; Anderson v. Acheson, 132 Iowa, 744, 9 L. R. A. N. S. 217; Neighbors v. Neighbors, 23 Ky. Law Rep. 1433; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Guthrie v. Weaver, 1 Mo. App. 136; Foley v. Phelps (N. Y.), 1 App. Div. 551; Pierce v. Swan Pt. Cem. 10 R. I. 227, 14 Am. Rep. 667, Lawson Cas. on Pers. Prop. 105; Griffith v. Charlotte Co., 23 S. Car. 25, 55 Am. Rep. 1, 24 Am. Law Reg. 586; Re Wong Yung Quy, 6 Sawy. 449; Sharpe's Case, Dears & B. 160; 2 Blacks. Comm. 428.

13. Hadsell v. Hadsell, 7 Ohio Cir. Ct. 196.

14. 4 Blacks. Comm. 235.

15. Driscoll v. Nichols, 71 Mass. 488.

16. A probate court exceeds its authority in intrusting the body of the deceased to a stranger, directing him to take it to Ireland and there to inter it. O'Donnell v. Slack, 123 Cal. 285, 43 L. R. A. 388.

17. Enos v. Snyder, 131 Cal. 68, 32 Am. St. 330, 53 L. R. A. 221.

18. Bogert v. Indianapolis, 13 Ind. 134; Anonymous (Ohio, 1871), 3 Chl. Leg. 378.

19. Pierce v. Swan P. Cem. 10 R. I. 227, 14 Am. Rep. 667, Lawson, Cas. Pers. Prop. 105; Gray v. State (Tex. Crim. 1908), 114 S. W. 635.

in regard thereto which will be enforced by the courts. The right to bury a dead body belongs, generally, to the next of kin,²⁰ if able and willing; but if there be a surviving spouse, such surviving spouse²¹ has a right to the custody and control of the body and of the funeral services, to designate a burial place,²² to bury the body, and to place a proper monument.²³ Parents²⁴ are entitled

A person entitled to the custody of a dead body is entitled to it in the condition in which it was when life became extinct; *Foley v. Phelps* (N. Y.), 1 App. Div. 551; and damages can be recovered for its mutilation; *Burney v. Children's Hosp.*, 169 Mass. 57, 16 Am. St. 273, 38 L. R. A. 413; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. 370, 14 L. R. A. 85; *Kyles v. Southern Co.*, 147 N. Car. 394, 16 L. R. A. N. S. 405; *Anonymous* (Ohio, 1871), 3 Chl. Leg. N. 378; but if an autopsy is performed in a decent and scientific manner under such circumstances as are authorized by a board of health of a city and in obedience to the requirements of a city ordinance for the purpose of ascertaining the cause of death, the medical board is not liable; *Cook v. Walley*, 1 Colo. App. 163; *Myers v. Duddenhauser* (Ky. App. 1906), 5 L. R. A. N. S. 727; *Young v. College*, 81 Md. 358, 31 L. R. A. 540; unless parts of the body are thrown away. *Palenzke v. Bruning*, 98 Ill. App. 644.

Damages will be allowed for the negligent act of a carrier transporting a body, resulting in delay causing decay so that the body was unfit for public view; *Beam v. Cleveland Co.*, 97 Ill. App. 24; and recovery will be allowed for wilfully leaving a casket out in the rain at a station, ruining the casket and greatly disfiguring the corpse. *Lindh v. Great N. Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A. N. S. 1018.

20. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388; *Palenzke v. Bruning*, 98 Ill. App. 644; *Bogert v. Indianapolis*, 13 Ind. 134; *McEntee v. Bonacum* (Nebr.), 60 L. R. A. 440; *Re Brick Church*, 4 Bradf. Surr. 503; *Gardner v. Swan Cem.*, 20 R. I. 646, 78 Am. St. 897.

21. A widow, if living with her husband at the time of his death, has the same rights as to his dead body as he would have had as to hers. *Larson v. Chase*, 47 Minn. 307, 28 Am. St. 370, 14 L. R. A. 85; *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. 762, 19 L. R. A. 558.

22. *Enos v. Snyder*, 131 Cal. 68, 82 Am. St. 330, 53 L. R. A. 221; *Neighbors v. Neighbors*, 23 Ky. Law Rep. 1433; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, 14 Am. Law Rev. 57; *Johnston v. Marinus*, 18 Abb. N. Cas. 72; *Hadsell v. Hadsell*, 7 Ohio Circ. Ct. 196.

23. See *Durell v. Hayward*, 75 Mass. 248, 69 Am. Dec. 284.

24. *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. 249, 9 L. R. A. 514; *Burney v. Children's Hosp.*, 169 Mass. 57, 16 Am. St. 273, 38 L. R. A. 413.

to the control of the body of their deceased child; and to the body of a deceased parent, each of the children has an equal right, and a mere majority cannot control. If the children cannot agree, the duty devolves on a court to exercise its best judgment as to the proper course to be pursued.²⁵ A brother²⁶ of the deceased, in the absence of nearer relatives,²⁷ has a right to the body. The personal representative²⁸ of the deceased does not have any rights as to the body as against the next of kin, although the common law rule is that he is under the duty to bury the deceased.²⁹

A corpse is not "personal goods and chattels" for which replevin can be maintained for a refusal to deliver it to the person entitled to its custody.³⁰ Courts of equity³¹ have power to settle controversies as to the burial of the dead and can give full and complete remedy and the jurisdiction is fully adequate.³² After a dead body has been buried it becomes a part of the ground,³³ and the courts are loth thereafter to order a removal³⁴ against the wishes of some of the next of kin if those en-

25. *Smiley v. Bartlett*, 6 Ohio Circ. Ct. 234.

26. *Beam v. Cleveland Co.*, 97 Ill. App. 24.

27. *Neighbors v. Neighbors*, 23 Ky. Law Rep. 1433.

28. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. 249, 9 L. R. A. 514.

29. 2 Blacks. Comm. 508. This merely means that such would be his duty in the absence of any of the next of kin desiring to take charge; and that it is his duty, in any case, to pay the expenses thereof out of the estate.

30. *Keyes v. Konkel*, 119 Mich. 550, 75 Am. St. 423, 44 L. R. A. 242.

31. *Weid v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, 14 Am. Law Rev. 57; *Wilson v. Read*, 74 N. H. 322.

32. *Pierce v. Swan P. Cem.*, 10 R. I. 227, 14 Am. Rep. 667, *Lawson*, Cas. Pers. Prop. 105.

33. *Anderson v. Acheson*, 132 Iowa, 744, 9 L. R. A. N. S. 217; *Wilson v. Read*, 74 N. H. 322, 124 Am. St. 973; *Re Brick Ch.*, 3 Edw. 155.

34. *Smiley v. Bartlett*, 6 Ohio Circ. Ct. 234; *Wynkoop v. Wyncoop*, 42 Pa. St. 293, 32 Am. Dec. 506.

titled to decide upon the place of burial had consented to the place selected.³⁵

§ 112. **Wild Animals.** There are some natural objects which, while in their original free state, are not subject to ownership;¹ but when confined are subject to a temporary ownership designated as qualified, limited or special² property. The principal objects of this class are wild animals, water and air.

Animals in a wild state are called "game,"³ and belong to the state.⁴ Absolute⁵ property cannot be acquired in an animal *ferae naturae*, though a qualified property therein can be acquired by reducing it to possession⁶ and keeping it in actual custody,⁷ unless such

35. *Pulsifer v. Douglass*, 94 Me. 556; *Guthrie v. Weaver*, 1 Mo. App. 136; *Pierce v. Swan P. Cem.*, 10 R. I. 227, 14 Am. Rep. 667, *Laws. Cas. Pers. Prop.* 105.

It is otherwise if consent was not given freely; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, 14 Am. Law Rev. 57; *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. 762, 19 L. R. A. 558; and a dead body may be exhumed when evidence is sought in a pending case. *Gray v. State* (Tex. Crim. 1908), 114 S. W. 635.

1. *Fritz v. State* (Ark. 1909), 115 S. W. 385. These objects have been called the "negative community." *Ohio Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729.

2. 2 Blacks. Comm. 391.

3. *State v. Weber*, 205 Mo. 36, 45, 120 Am. St. 715; 2 Blacks. Comm. 14.

4. *Ex parte Maier*, 103 Cal. 476, 42 Am. St. 129; *State v. Repp*, 104 Iowa, 305, 65 Am. St. 463, 40 L. R. A. 687; *Magner v. People*, 97 Ill. 320 (quail); *Re Schwartz*, 119 La. 290, 121 Am. St. 516 (birds); *State v. Hanlon*, 77 Ohio St. 19, 122 Am. St. 472 (fish); *Com. v. Papsone*, 57 Pittsb. Leg. J. 342; *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290; *U. S. v. Geer*, 161 U. S. 519, 40 L. ed. 793.

5. 2 Blacks. Comm. 390.

6. *People v. Truckee Co.*, 116 Cal. 397, 58 Am. St. 183, 39 L. R. A. 581 (fish); *Young v. Hichens*, 6 Q. B. 606, 51 E. C. L. 606; *Kent, Comm. part V, c. 35, p. 347*; 2 Inst., tit. I, § 12.

7. Fish in a net from which escape is practically, though not absolutely, impossible, are regarded as reduced to possession, as they are within the power and control of the pursuer; *State v. Shaw*, 67 Ohio St. 167, 60 L. R. A. 481; but branding wild cattle and letting them run at large again, will not make them absolute property. *Davis v. Green*, 2 Hawaii, 367.

capture was in violation of law.⁸ If a captured wild animal is reclaimed, that is, tamed,⁹ so that it has lost its former nature to such an extent as to recognize its home and to return to it (to have *animus revertendi*), the property therein becomes absolute; but if not reclaimed and it subsequently acquires its liberty, accidentally or otherwise,¹⁰ the qualified property therein is lost in.

After qualified property has been acquired in animals *ferae naturae* which are fit for food, they are subjects of larceny at common law. 4 Blacks. Comm. 403; *People v. Morrison*, 194 N. Y. 175, 128 Am. St. 552; *State v. Shaw*, 67 Ohio St. 157, 60 L. R. A. 481. Anyone taking oysters planted in public waters, knowing their condition, becomes a trespasser. *Fleet v. Hegeman*, 14 Wend. 42, 12 N. Y. Comm. L. 531.

8. *Magner v. People*, 97 Ill. 320. A moose captured during close time does not become property. *James v. Wood*, 82 Me. 175, 8 L. R. A. 448.

9. 2 Blacks. Comm. 391; *Kellogg v. King*, 114 Cal. 378, 55 Am. St. 74.

A buffalo calf captured at the age of six months, reared with domestic cattle, and which took food from the hands of its master and could be driven home easily, is no longer of a wild nature. *Ulery v. Jones*, 81 Ill. 403.

Wild geese so tame as to eat out of hand, are the subject of property, though they have strayed and had to be brought back, *Amory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316.

A canary bird in possession two years, which knew its name and would answer the call, and which on a former occasion had left its cage and returned a day or two afterwards, is property, and can be claimed from one who took possession five days after it again had left its cage. *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764, *Pattee*, Illus. Cas. in *Personalty*, 26, *Lawson*, Cas. *Pers. Prop.* 167.

Bees are regarded as reclaimed when hived. *Gillet v. Mason*, 7 Johns. 16, *Pattee*, Illus. Cas. in *Personalty*, 28, *Van Zile*, Illus. Cas. in *Personalty*, 36; 2 Blacks. Comm. 392.

Oysters and clams, not having power of locomotion, are regarded as reclaimed when planted where none existed before. *Fleet v. Hegeman*, 14 Wend. 42, *Lawson*, Cas. on *Pers. Prop.* 101.

10. Fish placed in a cove eight feet deep which covers about two acres of land, are restored to their native element and the right of property in them is lost, although a wire fence extends across the mouth of the cove. *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. 404, 20 L. R. A. 94.

Oysters planted in navigable waters by one not the owner of the adjoining land, and without staking them off, are returned to their

stantly,¹¹ unless it is pursued and recaptured¹² immediately. A wild animal by being killed becomes absolute property at once.¹³

§ 113. **Water and Air.** Water and other liquids and gases very aptly have been termed “mineral *ferae naturae*.”¹⁴ Property in water, of necessity, must be transient and usufructuary,¹⁵ being lost when it returns to the common stock.¹⁶ It is by separation¹⁷ only that even a qualified property can be acquired therein. When gathered in a basin¹⁸ or well,¹⁹ or collected in pipes²⁰ or reservoirs,²¹ it is sufficiently reduced to possession to become property.

The same principle, undoubtedly, applies to air. No one owns the air; but the scientist who liquifies a part of it in a receptacle, has a qualified property therein as long as it remains confined in that state.²²

natural element, and property therein instantly ceases. *Brinkerhoff v. Starkins*, 11 Barb. 252.

11. 2 Blacks. Comm. 393.

12. When a swarm of bees leaves the hive, and the owner follows and keeps them in sight, marking the tree into which they enter, he does not lose his property, and can recover from the land-owner who, two months afterward, cuts down the tree, kills the bees, and takes the honey. *Goff v. Kilts*, 15 Wend. 550, Pattee, Illus. Cas. in Personalty, 23.

13. 2 Blacks. Comm. 403. Game killed by a trespasser on land, belongs to its captor. *State v. Horton*, 139 N. Car. 588, 1 L. R. A. N. S. 991.

14. *Ohio Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729.

15. 2 Blacks. Comm. 18.

16. 2 Blackstone Comm. 14.

17. *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. 746. Constructing a dam across the outlet of a lake is not sufficient to make the water therein property. *Syracuse v. Stacey*, 169 N. Y. 231.

18. *Myer v. Whitaker*, 5 Abb. N. Cas. 172, 55 How. Pr. 376.

19. *Race v. Ward*, 3 E. & B. 710.

20. *Fallon v. O'Brien*, 11 Q. B. D. 21.

21. *People v. Blake*, 19 Cal. 579; *Spring V. W. W. v. Schottler*, 110 U. S. 347, 28 L. ed. 183; *Magistrates v. Elphinstone*, 3 Kames Dec. 331.

22. 22 Harv. Law Rev. 202.

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§ 114. **Incapacity of Persons as to Property.** Certain persons have restrictions placed upon them as to the kind or the amount of property which can be acquired, held, or transferred by them. The restrictions upon an alien are not so great in regard too personal property as in regard to real property; and the rights of a non-resident alien are not as great as those of a resident alien,²³ the latter having substantially the same rights to personal property as a citizen.²⁴ In time of war the residents of the country against which war has been declared, have very limited rights in this country,²⁵ even though American citizens.²⁶ Some persons, on account of natural or legal capacity, have restrictions placed upon acquiring, holding, or disposing of property, such as infants,²⁷ Indians,²⁸ and corporations.²⁹ Some things are incapable of transfer because such a transfer would be illegal;³⁰ but these matters belong more properly to a treatise on Contracts.

23. In some states a non-resident alien cannot recover damages under a statute for injury causing death. *Deni v. Pennsylvania Co.*, 181 Pa. St. 525, 59 Am. St. 676; *Malorano v. Baltimore Co.*, (U. S.) 29 S. Ct. 424.

24. *Richmond v. Milne's Ex'rs*, 37 La. (17 La.) 312, 36 Am. Dec. 613; *Palmer v. DeWitt*, 42 N. Y. 532, 7 Am. Rep. 480.

25. 2 Blacks. Comm. 260.

26. A person voluntarily remaining in territory of an enemy is subject to all of the disabilities of an alien enemy. *Sanderson v. Morgan*, 39 N. Y. 231.

27. *Hughes v. Murphy*, (Ga. App. 1908) 63 S. E. 231.

28. It is illegal to sell or to give any malt, spirituous, or vinous liquor to an Indian. Act of Jan. 30, 1897, ch. 109, 29 Stat. L. 506.

29. *Fietsam v. Hay* 122 Ill. 293, 3 Am. St. 492; *Farrington v. Putman*, 90 Me. 405, 38 L. R. A. 339.

30. The assignment of a pension granted by the United States would not possess any validity. U. S. Rev. St., § 4745; Act of Feb. 28, 1883, ch. 58, § 2; 22 Stat. L. 431. The assignment by a sailor of his pay, is invalid. U. S. Rev. St. § 4536; Act of June 7, 1872, ch. 322, § 61; 17 Stat. L. 276. See U. S. Rev. Stat. § 3477 for restriction on assigning claims against the United States; and U. S. Rev. St. § 480 for restriction on acquiring interest in a patent.

§ 115. **Use of Property Causing Injury.** Although a person may have absolute title to property, he is under a duty to use it so that it shall not work injury to other persons¹ or to their property, or be injurious to the public;² that is, a person does not have a right to use his property so as to create a public³ or a private nuisance, the Latin maxim being "*sic utere tuo, ut alienum non laedas*"⁴ (so use your own as not to injure another.)⁵ This subject, however, more properly belongs to a treatise on Torts,⁶ and will not be discussed any further here.

§ 116. **Police Power.** All rights are subject to the general police power⁷ of the state, which is inherent and plenary, enabling the state to regulate or to prohibit all things hurtful to society.⁸ The sale of provisions,⁹ traf-

1. *Barmore v. Vicksburg Co.*, 85 Miss. 426, 70 L. R. A. 627; *Chambers v. Walker*, 57 Pittsb. Leg. J. 210.

2. *Bland v. People*, 32 Colo. 319, 105 Am. St. 80, 65 L. R. A. 424.

3. An old, disused and nearly sunken hulk of a boat fastened to a pier in such a way as to impede navigation in a river is a public nuisance; *McLean v. Mathews*, 7 Ill. App. 599; so are fish-nets in prohibited waters; *Lawton v. State*, 119 N. Y. 226, 16 Am. St. 813, 7 L. R. A. 134; and gunpowder, nitroglycerine and other explosives kept in or dangerously near public places, such as towns or highways. *Wilson v. Phoenix Co.*, 40 W. Va. 413, 52 Am. St. 890.

4. 3 Blacks. Comm. 317; *Bishop v. Banks*, 33 Conn. 118, *Pattee, Illus. Cas. in Personalty*, 11; *Illinois Co. v. Grabill*, 50 Ill. 241; *McGlone v. Womack*, (Ky. 1908) 17 L. R. A. N. S. 855; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623, *Lawson, Cas. Pers. Prop.* 35.

5. *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. 119, 37 L. R. A. 497; *People's Co. v. Excelsior*, 44 Mich. 229, 38 Am. Rep. 246.

6. See, *Cooley, Torts*, (3d ed.)

7. *Com. v. McCafferty*, 145 Mass. 384; *Noble B'k v. Haskell*, (Okla.) 97 Pac. 590; *Missouri R'y v. Haber*, 169 U. S. 613.

8. *Meadowcroft v. People*, 163 Ill. 56, 54 Am. St. 447, 35 L. R. A. 176; *Miller v. Syracuse*, 168 Ind. 230, 8 L. R. A. N. S. 471; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

9. *Mayor v. Yuille*, 3 Ala. 137; *Chicago v. Bowman Co.* 234 Ill. 294, 17 L. R. A. 684; *New Orleans v. Faber*, 105 La. 208, 53 L. R. A. 165; *Com. v. McArthur*, 152 Mass. 522; *People v. Wagner*, 86 Mich. 594; *State v. Crescent Co.*, 83 Minn. 284, 85 Am. St. 464, 54 L. R. A. 466; *Paige v. Fazackerly*, 36 Barb. 392; *Re Nasmith*, 2 Ont. 192.

fic in liquors,¹⁰ the keeping of animals,¹¹ and the speed,¹² height,¹³ and operation¹⁴ of vehicles can be regulated, and noises¹⁵ on public streets can be prohibited.

A person must not use his property so as to violate the criminal laws,¹⁶ such as carrying concealed weapons,¹⁷ being cruel to animals,¹⁸ having or disposing of obscene or indecent books¹⁹ or photographs,²⁰ and the like. For further treatment of these subjects the student is referred to treatises on Police Power,²¹ on Constitutional Law²² and on Criminal Law.²³

10. *Altenburg v. Com.* 126 Pa. St. 602, 4 L. R. A. 542.

11. 3 Blacks. Comm. 317; *Bishop v. Banks*, 33 Conn. 118, *Pattee, Illus. Cas. in Personalty*, 11; *Sifers v. Johnson*, 7 Ida. 798, 54 L. R. A. 785. Keeping dogs. *McGlone v. Womack*, (Ky. 1908) 17 L. R. A. N. S. 855; *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; *Chambers v. Walker*, 57 Pittsb. Leg. J. 210. Keeping hogs in town. *Miller v. Syracuse*, 168 Ind. 230, 8 L. R. A. N. S. 471; *Darlington v. Ward*, 48 S. Car. 570, 38 L. R. A. 326.

12. Automobiles. *Christy v. Elliott*, 216 Ill. 81, 108 Am. St. 196. 1 L. R. A. N. S. 215; *Com. v. Kingsbury*, 199 Mass. 542.

13. *People v. Shellenberg*, 117 N. Y. Supp. 820.

14. Street-cars. *Sluder v. St. Louis Co.*, 189 Mo. 107, 5 L. R. A. N. S. 186. Automobiles can be excluded from certain highways. *Com. v. Kingsbury*, (Mass.) 85 N. E. 848.

15. A person does not have a right to play a cornet in the street in violation of law, although done as a matter of religious worship. *Com. v. Plaisted*, 148 Mass. 375, 12 Am. St. 566, 2 L. R. A. 142.

16. *Kinney v. Koopman*, 116 Ala. 310, 67 Am. St. 119, 37 L. R. A. 497 (keeping gunpowder within corporate limits.)

17. *Dunston v. State*, 124 Ala. 89, 82 Am. St. 152; *Carroll v. State*, 28 Ark. 99, 18 Am. R  p. 538.

18. *Tally v. State* (Ga. App. 1909) 63 S. E. 543; *State v. Karstendiek*, 100 La. (49 La. Ann.) 1621, 39 L. R. A. 520; *People v. Court*, 4 Hun, 441. Docking horse's tail. *Bland v. People*, 32 Colo. 319, 105 Am. St. 80, 56 L. R. A. 424.

19. *Com. v. Buckley*, 200 Mass. 346.

20. *People v. Muller*, 96 N. Y. 408, 48 Am. Rep. 635, 2 N. Y. Crim. 375.

21. See Freund, Police Power.

22. See Cooley, Const. Law.

23. See Washburn, Outlines of Crim. Law.

§ 117. **Fraudulent Transfers.** There are restrictions not only in the use of property, but also upon its transfer. A debtor is not allowed to transfer his property in fraud of his creditors;²⁴ and it does not make any difference what form the transaction takes, whether a conveyance,²⁵ a mortgage,²⁶ a gift,²⁷ a declaration of trust,²⁸ or an execution sale.²⁹ To constitute a transfer fraudulent the debtor must be insolvent; hence a debtor may dispose of his property provided enough is left to pay all of his debts.³⁰

24. *Tallon v. Ellison*, 3 Nebr. 63.

25. *Bradley v. Buford*, 2 Ky. 12, 2 Am. Dec. 703.

26. *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429; *Bremer v. Fleckenstein*, 9 Oreg. 266; *Rindskopf v. Vaughan*, 40 Fed. 394.

27. *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. 440; *Chase v. Redding*, 79 Mass. 418; *Dunn v. German-Am. B'k*, 109 Mo. 90; *Huntington v. Gilmore*, 14 Barb. 243; *Hall v. Feeney* (S. Dak. 1908), 118 N. W. 1038; *Gass v. Simpson*, 44 Tenn. 288; *Yancy v. Fields*, 85 Va. 756.

A transfer by an insolvent without consideration is conclusively fraudulent. *Thornton, Gifts*, 467, § 473; *Blacks. Comm.* 441. A donor must be just before he is generous. *Thornton, Gifts*, 46, § 49. If the transfer was for a consideration, the fraudulent intention must be known to, and participated in, by the transferee. *Blake v. Jones*, 1 Bailey Eq. 141, 21 Am. Dec. 530. Where a mortgagee, through connivance with the mortgagor to defraud the creditors of the latter, advances money, he does not have any equity, as against the creditors, to be protected for the amount so advanced; *Ferguson v. Hillman*, 55 Wis. 181; but if a transferee of property is without notice, and the consideration is inadequate, the excess only can be reached. *Griswold v. Szwaneek* (Nebr. 1903), 118 N. W. 1073. The burden of proving fraud is on the one attacking the validity of the transaction. *State v. Wallace*, 67 Iowa, 77; *Shores v. Doherty*, 65 Wis. 153.

28. *Beakes Co. v. Berns* (N. Y.), 128 App. Div. 137. A debtor cannot transfer all of his property to secure the future support of himself and family, as against judgment creditors. *Annis v. Bonar*, 86 Ill. 128; *Waddingham's Ex'rs v. Loker*, 44 Mo. 132, 100 Am. Dec. 260, *Lawson, Cas. Pers. Prop.* 83.

29. *Rorer, Jud. Sales* (2d ed.), 478, § 1311.

30. *Dodd v. McCraw*, 8 Ark. 84, 46 Am. Dec. 301; *Virgin v. Gaither*, 42 Ill. 39; *Cox v. Hunter*, 79 Ind. 590; *Chase v. McCoy*, 72 La. (21 La. Ann.) 192; *Brooks v. Brooks*, 12 S. Car. 422; *Thornton, Gifts*, 469, § 475.

Where the transaction is fraudulent as to creditors they can proceed to sell the property under execution as belonging to the debtor,³¹ although as between the debtor and his transferee, the title of the latter is good.³² If, however, before the creditors proceed against the property, the transferee disposes of it to a third person for value who is ignorant of the circumstances under which the debtor transferred it, such third person can hold it free from all claims³³ against the debtor; for although the title of the original transferee was voidable by the creditors, it remains valid until avoided; hence, if it has not been avoided before the subsequent sale, it is a valid title which the third person acquires. As he did not participate in the fraud, his equities are equal to those of the creditors, and his title is not voidable; but the money received by the original transferee would be regarded as held in trust³⁴ for the creditors. If the purchaser is conusant of the circumstances under which the original transferee acquired the property, such purchaser holds it still subject to the rights of the creditors as before the transfer.³⁵ Generally only those who were creditors at

31. 1 Freeman, Executions (3d ed.), 611, § 136. Property fraudulently disposed of can be reached in equity by a "creditors' bill." *Exchange B'k v. Stewart* (Ala.), 48 So. 487.

32. App. of Colburn, 74 Conn. 463, 92 Am. St. 231; *Tremblay v. Insurance Co.*, 97 Me. 547; *Patterson v. Insurance Co.*, 100 Wis. 118, 69 Am. St. 899, 42 L. R. A. 253; *Re Steele*, 98 Fed. 78.

Where a note is made payable to another at the instigation of a debtor, the debtor cannot reclaim from the payee. *Thweatt v. McCullough*, 84 Ala. 517, 5 Am. St. 391.

33. 1 Freeman, Executions (3d ed.), 631, § 140; *Neal v. Gregory*, 19 Fla. 356; *Smith v. Selz*, 114 Ind. 229; *Des Moines Co. v. Lent*, 75 Iowa, 522; *Scheble v. Jordan*, 30 Kans. 353; *Mansfield v. Dyer*, 131 Mass. 200; *Hedman v. Anderson*, 6 Nebr. 392; *Comey v. Pickering*, 63 N. H. 126; *Zoeller v. Riley*, 100 N. Y. 402, 53 Am. Rep. 157; *Young v. Lathrop*, 67 N. Car. 63, 12 Am. Rep. 603; *Paul v. Baugh*, 85 Va. 955.

34. *Hulley v. Chedic*, 22 Nev. 127, 58 Am. St. 729; *Bremer v. Fleckenstein*, 9 Oreg. 266.

35. *Luedecke v. Des Moines Co.* (Iowa), 118 N. W. 456.

the time a transfer was made by their debtor, can attack its validity.³⁶

In the absence of a statute³⁷ forbidding it, an insolvent debtor, by mortgage or otherwise, can prefer¹ some of his creditors to others, or can prefer one² creditor, even though related³ to him, and the debtor uses the whole⁴ of his property for that purpose, and other creditors have begun suit⁵ against him; and the secured creditor can not be deprived of his security simply because of knowledge that the debtor was in failing circumstances,⁶ or that the debtor intended to prevent other

36. *Re McEachern*, 82 Cal. 219; *Barbour v. Insurance Co.*, 61 Conn. 248; *Hoag v. Martin*, 80 Iowa, 714; *Pierce v. Boston B'k*, 129 Mass. 425, 37 Am. Rep. 371, 4 Gray, Cas. on Prop. 112; *Wooden v. Wooden*, 72 Mich. 347; *Re Kellog*, 1 Silv. App. 313; *Smith v. Littlejohn*, 2 McCord, 362; *Terry v. O'Neal*, 71 Tex. 592; *Stokes v. Oliver*, 76 Va. 72; *Re Hellbron*, 14 Wash. 541, 35 L. R. A. 604.

In some states a gift made to defraud subsequent creditors can be avoided by them. *Thornton, Gifts*, 470, § 477; *Thomas v. Degraffenreid*, 17 Ala. 602; *Hood v. Jones*, 5 Del. Ch. 77; *Bishop v. Redmond*, 83 Ind. 157; *Winchester v. Charter*, 94 Mass. 606; *Conover v. Ruckman*, 36 N. J. Eq. 493; *Webb v. Roff*, 9 Ohio St. 430; *Madden v. Day*, 1 Bailey, 337; *Dosche v. Nette*, 81 Tex. 265.

37. See Fed. Bankr. Act of 1898, § 60.

1. *Ex parte Conway*, 4 Ark. 361; *Einstein's Sons v. Shouse*, 24 Fla. 490; *Bridgford v. Barbour*, 80 Ky. 529; *Flower v. Cornish*, 25 Minn. 473; *Brown v. Williams (Nebr.)*, 51 N. W. 851; *Van Heusen v. Radcliff*, 17 N. Y. 580, 72 Am. Dec. 480; *Cross v. Carstens (Ohio)*, 31 N. E. 506; *Wilson v. Esten*, 14 R. I. 621; *Allis v. Jones*, 45 Fed. 148; *Estwick v. Cailland*, 5 T. R. 420. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee. *Sabin v. Columbia Co.*, 25 Oreg. 15, 42 Am. St. 756.

2. *Fromme v. Jones*, 13 Iowa, 474; *Allen v. Kennedy*, 49 Wis. 549.

3. *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160; *Noyes v. Ross*, 23 Mont. 425, 75 Am. St. 543, 47 L. R. A. 400.

4. *Southern Co. v. Haas*, 73 Iowa, 399; *Gage v. Chesebro*, 49 Wis. 486.

5. *Randall v. Shaw*, 28 Kans. 419.

6. *Cromelin v. McCauley*, 67 Ala. 542; *Olmstead v. Mattison*, 45 Mich. 617; *North v. Crowell*, 11 N. H. 251; *Williams v. Lord*, 75 Va. 402; *Gage v. Chesebro*, 49 Wis. 486.

creditors from enforcing their claims,⁷ provided the creditor secured does not accept the security for the purpose of defeating the other creditors but to protect a *bona fide* indebtedness.

§ 118. **Restrictions on Alienation.** Generally an estate cannot be limited so that the income cannot be reached by the creditors of the beneficiary;⁸ though property can be given to a person on condition that if an attempt be made to sell or to incumber it, the property shall go to someone else.⁹ In this way, creditors can not reach the property, but it would be lost to the debtor.

§ 119. **Perpetuities.** A contract or a will should not attempt to give rights or property in violation of the rule against perpetuities¹⁰ and accumulations. A perpetuity exists when property is limited so that it may not vest during the continuance of the life or lives of a person or persons living at the time such limitation is made or within twenty-one and a fraction years after the termination of such life or lives; or when rights are granted which may not be exercised within that time. Thus, if a legacy is given to a trustee with directions to pay the income therefrom to A. for life and to distribute the leg-

The vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. *Randall v. Shaw*, 28 Kans. 419; *Sabin v. Columbia Co.*, 25 Oreg. 15, 42 Am. St. 756.

7. *Eureka Works v. Bresnahan*, 66 Mich. 489; *Sabin v. Columbia Co.*, 25 Oreg. 15, 42 Am. St. 756.

8. In a very few states "spendthrift trusts" are recognized. They are trusts created by another than the *cestui que* trust, which provide that the income shall be paid to the latter in person, thus preventing it being reached by his creditors. *Steib v. Whitehead*, 111 Ill. 247.

9. *Waldo v. Cummings*, 45 Ill. 421.

10. *Matter of Wilcox*, 194 N. Y. 288; *Smith's App.*, 88 Pa. St. 492, 5 Gray, Cas. on Prop. 787.

A trust for testator's children "and their heirs" without any provision for its termination, violates the rule; *Slade v. Patten*, 68 Me. 380, 5 Gray, Cas. on Prop. 615; but a limitation "for as long a period as is legally possible" is valid. *Fitchie v. Brown* (1908), 29 S. Ct. 106, aff'g 18 Haw. 52.

acy among A's children as they reach the age of twenty-five,¹¹ the rule would be violated and the legacy would be void; though if the direction had been to pay the income to A. for life and to distribute the legacy among his children as they reached the age of twenty-one, such a disposition would have been valid.

Although the law is opposed to restrictions on alienation, it recognizes the fact that there are certain persons who should not be intrusted with the control of property; and the rule against perpetuities was adopted by the common law as a mean between one extreme of forbidding all restrictions on alienation, and the other extreme of allowing unlimited restrictions. Under this rule, a person can provide for the care of his children or other living persons for life, and for their children or others until the latter attain their majority. As is usual the law has adopted a simple, arbitrary rule to apply to all cases. Statutes¹² in some states have changed the common law. In order that a posthumous child may attain majority, a fraction of a year, to allow for the time of gestation, will be added to the twenty-one year period if necessary. At common law there was no limit as to the number of concurrent lives measuring the time during which the vesting of an estate could be postponed, provided the persons were all designated and living at the time the limitation was made, for it was in effect a limitation for one life only—that of the one living longest.¹³

11. *Lawrence v. Smith*, 163 Ill. 149.

12. In New York the suspension of absolute ownership is allowed for only two lives in being instead of for any number of lives in being. N. Y. Rev. St., pt. 2, ch. 1, § 15.

In California the time is shortened to lives in being only without the added period of twenty-one and a fraction years. Civil Code, § 715.

13. Such cases are likened to a number of candles all burning at the same time. *Smith's App.*, 88 Pa. St. 492, 5 Gray, Cas. on Prop. 737.

It must be remembered that the rule is that, to be a valid limitation, the interest *must*¹⁴ vest, not that it *may* vest, within the designated period. If there is any possibility that, at the time the limitation is made,¹⁵ events might¹⁶ happen, however improbable, which would postpone the vesting beyond the required time, the rule is violated. Thus in the illustration above of the limitation to A. for life and then to his children when they attain the age of twenty-five, it would not avail that, as a matter of fact, all of A's children were twenty-five at the time the limitation was made so that they could have taken the property instantly on his death. As there was a legal possibility, however improbable it might be, that A. might leave children under the age of four years at his death who would not be twenty-five within twenty-one years from his death, the rule is violated. As a human life may be very brief, a postponement of the distribution of property for a very short period¹⁷ will violate the rule if there is a contingency as to what persons are to take at the expiration of the time, such contingency relating to life and survivorship.¹⁸

If the vesting of a legacy is in suspense indefinitely it violates the rule. Thus, if a legacy be given to establish a college, provided a designated additional sum be raised, the payment of the legacy would depend on a contingency precedent, the time of whose occurrence is

In *Fitchie v. Brown* (1908), 29 S. Ct. 106, aff'g 18 Hawaii, 52, forty life estates were held not to be too large a number for a valid limitation, as in *Humbertson v. Humbertson*, 1 P. Wms. 332, there were about fifty.

14. *Est. of Walkerly*, 108 Cal. 627, 49 Am. St. 97.

15. *Matter of Wilcox*, 194 N. Y. 238.

16. *Quinlan v. Wickman*, 233 Ill. 39; *Andrews v. Lincoln*, 95 Me. 541, 56 L. R. A. 103; *Fosdick v. Fosdick*, 88 Mass. 41, 5 Gray, Cas. on Prop. 609; *Smith's App.*, 88 Pa. St. 492, 5 Gray, Cas. on Prop. 737.

17. *Dodge v. Pond*, 23 N. Y. 69. However short the period, the persons might die—a possibility not to be endured. *Est. of Walkerly*, 108 Cal. 627, 49 Am. St. 97.

18. *Owsley v. Harrison*, 190 Ill. 235.

uncertain, leaving the legacy in suspense indefinitely, which would be a violation of the rule; but if a legacy is vested, a provision for the time of payment at a future definite period ¹⁹ is not a violation of the rule.

Whenever a contract raises an equitable right in property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the rule against perpetuities.²⁰ Hence an option for purchase giving the optionee, on the payment of a designated sum, the right to extend the option yearly without limitation, is a violation of the rule.²¹

If the rule is violated, that part of the limitation which constitutes the violation is void and the property will be treated as though such limitation never had been made.²²

An accumulation of property, that is, a direction to add income therefrom to the principal for a designated period

19. *Dodge v. Pond*, 23 N. Y. 69.

20. *London Co. v. Gomm*, 20 Ch. D. 562.

21. *Starcher v. Duty*, 61 W. Va. 373, 123 Am. St. 990.

22. *Est. of Walkerly*, 108 Cal. 627, 49 Am. St. 97, 109; *Andrews v. Lincoln*, 95 Me. 541, 56 L. R. A. 103; *Fosdick v. Fosdick*, 88 Mass. 41, 5 Gray. Cas. on Prop, 609.

A legacy violating the rule against perpetuities is void and goes to the residuary legatees if any; otherwise it must be treated as intestate property, passing to the next of kin. *Matter of Wilcox*, 194 N. Y. 288.

Where a limitation is to arise upon an alternative event, one branch of which is within and the other not within the prescribed limits, and one must happen, if at all, within the limit, and one may not happen within the required time, the former is good although the latter is void; and if the former event happen, the limitation over will take effect. Thus, property left in trust for W. for life, then for the children of W. until the youngest is thirty, and then to be divided among the children; but if W. die without child, to B., the limitation over to B. would be valid though the other is void; and after the death of W. leaving children, the property would pass as intestate. *Quinlan v. Wickman*, 233 Ill. 39.

Specific legacies to be paid presently will be upheld although payable out of a trust which is void under the rule; but other bequests would fail, the property passing as if there was no will. *Lawrence v. Smith*, 163 Ill. 149.

instead of distributing it periodically, is valid²³ unless the time during which the accumulation is directed to be made violates the rule against perpetuities by postponing ultimate distribution longer than a life or lives in being and twenty-one and a fraction years after such direction is given.²⁴

§ 120. **Classification of Interests.** Personal property may be considered with respect to the quantity of interest possessed; with respect to the time of enjoyment of such interest; with respect to the number and connection of owners; with respect to the terms and manner of enjoyment; and with respect to the court recognizing and enforcing interests. If the quantity of interest possessed by a person in personal property is unlimited in duration, he is said to have absolute ownership, this corresponding to a fee-simple in real property, and being the customary method in which property is owned. If the interest is for a shorter time, it would be a life estate or a bailment.

§ 121. **Life Estates.** The old common law¹ did not recognize any such interest in personal property as a life estate. A few centuries ago the amount of personal property was very small and was perishable in its nature; and as a life estate was considered more important than any chattel interest ever could be, there was, in theory,

23. *Waldo v. Cummings*, 45 Ill. 421. In some states accumulations are regulated by statute which provides who shall take. *Craig v. Craig*, 3 Barb. Ch. 76.

24. A trust is void which provides for the investment of \$2,000 until the fund should be equal to the debt of the state of Pennsylvania, when the debt should be discharged with such fund, the debt at the time of the creation of the trust being \$40,000,000. As the state was to receive the benefit only on a contingency which might happen at some indefinite time in the future, the rule against remoteness of accumulations was violated. *Russell v. Girard Co.*, 171 Fed. 161.

1. *Kirkpatrick v. Davidson*, 2 Kelly, 302; *Patterson v. Devlin*, 13 S. Car. Eq. (McMull. Eq.) 459.

nothing remaining after a life estate.² Giving a life estate was regarded as equivalent to a bestowal of the entire³ interest. This rule answered very well for a rude people; but as the quantity and value of personal property increased, and the facts showed the fallacy of the theory, the inconvenience and injustice of the rule was overcome at first by resorting to the fiction that when the legal title was transferred to one person, the use⁴ of it could be given to another for the life of the latter, the possession of the rightful owner thus being postponed until the death of the one entitled to its use. Later, the fiction was abandoned; and now a life estate can be created in personal property.⁵

When life estates are created in real property it is usual to place the life tenant in actual possession of the land, as his opportunities and facilities for injuring the property or of disposing of it to the detriment of those who are to take after him, are very limited and can be prevented; but owing to the ease with which personal property can be transferred, destroyed or injured, it is usual to create a life estate in personal property by means of a trust, converting all the property into money,⁶ the trustee paying the income⁷ therefrom to the life tenant,

2. *Brummet v. Barber*, 15 S. Car. L. (2 Hill) 548, 5 Gray, Cas. on Prop. 148.

3. *Willson v. Cockrill*, 8 Mo. 1, 5 Gray, Cas. on Prop. 157; *Cutler v. Spiller's Adm'rs*, 2 N. Car. 130.

4. *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298; *Waldo v. Cummings*, 45 Ill. 421; *Jaggers v. Estes*, 16 S. Car. Eq. (2 Strobb. Eq.) 343.

5. *Ragsdale v. Norwood*, 38 Ala. 21, 79 Am. Dec. 79; *Trogdon v. Murphy*, 85 Ill. 119; *Duke's Ex'rs v. Dyches*, 16 S. Car. Eq. (2 Strobb. Eq.) 353 n., 5 Gray, Cas. on Prop. 145; *Hide v. Parrat*, 2 Vern. 331.

6. *Buckingham v. Morrison*, 186 Ill. 448; *Patterson v. Devlin*, 13 S. Car. Eq. (McMull. Eq.) 459.

7. *Green v. Bissell*, 79 Conn. 547, 118 Am. St. 156; 8 L. R. A. N. S. 1011; *American Co. v. Payne*, (D. C. 1909) 37 Wash. Law Rep. 258; *DeKoven v. Alsop*, 205 Ill. 309, 63 L. R. A. 5; *Hite's Devisees v. Hite's Ex'r* 93 Ky. 257, 14 Ky. Law Rep. 385, 40 Am. St. 189, 19 L. R. A. 173; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L. R. A. N. S. 763.

and paying the principal,⁸ on the death of the life tenant, to the person entitled to it. However, if the intention⁹ of the one creating the life estate is that the life tenant shall have actual possession and specific enjoyment of the articles themselves, such intention will be carried out; but, in such a case, it is the duty of the life tenant to preserve the estate in a good condition; and he can be required to give security¹⁰ that it shall not be wasted. In considering life estates in specific property it must be borne in mind that the value of some kinds of personal property consists entirely in their consumption such as provisions; the value of other kinds consists entirely in their use during which some articles necessarily wear out rapidly, as livestock and implements, while others wear out more slowly, such as furniture; money is treated as not wearing out at all by use, its use producing income to which only the life tenant is entitled.¹¹ Where a life estate is attempted to be given in articles in specie which are of use only by their destruction, such as fuel, the life tenant is allowed to destroy them by use, and any limi-

Where a widow is entitled to dower in money she is given one-third of the income therefrom for life. *Campbell v. Murphy*, 55 N. Car. 357.

8. *Boardman v. Mansfield*, 79 Conn. 634, 118 Am. St. 178, 12 L. R. A. N. S. 793; *Kalbach v. Clark*, 133 Iowa, 215, 12 L. R. A. N. S. 801; *Re Stevens*, 187 N. Y. 471, 12 L. R. A. N. S. 814.

9. Such an intention may be shown in various ways. Thus where a testator directed a sale of the property *after* the death of the life tenant, and provided for a substitution of one article for another during the continuance of the life estate, and the life tenant was to take certain action with reference to certain articles which could not be done without possession by him, there was no difficulty in reaching the conclusion that it was the intention to give him actual possession of the property and not merely the income from the proceeds of a sale of such articles. *Brooks v. Brooks*, 12 S. Car. 422.

10. *Burnett v. Lester*, 53 Ill. 325; *Scott v. Scott*, 137 Iowa, 239, 23 L. R. A. N. S. 716.

11. *Burnett v. Lester*, 53 Ill. 325; *Patterson v. Devlin*, 13 S. Car. Eq. (McMull. Eq.) 459.

tation over, being inconsistent, is void.¹² As to such articles as necessarily wear out rapidly by use, there is a *prima facie* presumption that they have perished during the continuance of the life estate; but as to other articles there is a *prima facie* presumption that they have survived the life estate, and the next taker is bound to accept what remains of them although deteriorated,¹³ the estate of the life tenant being liable for any articles lost, destroyed or deteriorated through negligence. An estate *pur autre vie*¹⁴ can exist in personal as well as in real property,¹⁵ as where the person having a life estate transfers his interest to another; in which case the interest of the transferee would be terminated by the death of the original life tenant.

§ 122. Rule in Shelley's Case—Estates Tail. The Rule in Shelley's Case, although more properly having application to real property, applies by analogy to personal property;¹ that is, if personal property be given by will to a person for life with remainder to his personal representatives or next of kin,² such person will acquire

12. *Seabrook v. Grimes*, 107 Md. 410, 126 Am. St. 400.

13. *Patterson v. Devlin*, 13 S. Car. Eq. (McMull. Eq.) 459.

14. *Old French*, for another's life.

15. *Tucker v. Ex'rs of Stevens*, 2 S. Car. Eq. (4 DeSaus. Eq.) 532, 5 Gray, Cas. on Prop. 142.

1. *Mason v. Pate*, 34 Ala. 379; *Watts v. Clardy*, 2 Fla. 369, *Glover v. Condell*, 163 Ill. 566; *Hughes v. Nicklas*, 70 Md. 484, 14 Am. St. 377; *Pressgrove v. Comfort*, 53 Miss. 644; *Knox v. Barker*, 8 N. Dak. 272; *Cockin's App.* 111 Pa. St. 26; *Taylor v. Lindsay*, 14 R. I. 518; *Dott v. Cunningham*, 1 Bay, 453, 1 Am. Dec. 624; *Polk v. Faris*, 17 Tenn. 209, 30 Am. Dec. 400; *Butterfield v. Butterfield*, 1 Ves. 154.

2. Where personal property is given to a person for life with remainder to his heirs, the question is more difficult, as the heirs are not always the same persons as the next of kin. In some states the Rule in Shelly's Case is applied even in such instances; *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298; *Horne v. Lyeth*, 4 Harr. & J. 431; *Cockin's Appeal*, 111 Pa. St. 26; but in others the heirs will take a remainder if the word "heirs" is used in its technical sense. *Jones v. Rees*, (Del. 1908) 16 L. R. A. N. S. 734.

the entire interest with the right to make absolute disposition of the property, provided, however, it is not contrary to the intention of the testator.³ In the language of the law the words "personal representatives" or "next of kin" are words of limitation indicating the quantity of interest given; and if the personal representatives or next of kin ever acquire any interest they do so by virtue of administration or distribution after the decease of the owner, and do not take as purchasers. The theory of the rule is that the personal representatives or the next of kin are placed in exactly the same position, if the property survive the life of the person to whom it is given, as if they took as remaindermen; and the rule aids the policy of the law which is against restraints on alienation.

An estate-tail cannot be created in personal property, that it, it cannot be limited so that it must pass indefinitely to some particular class of the next of kin, an attempt to do so being treated as giving absolute ownership.⁴

§ 123. Bailments—Nature. A Bailment⁵ is possession, by agreement, of a chattel personal belonging to another. In the law of real property, interests in land for less than a life estate are known as estates for years,

3. *Lord v. Comstock*, 240 Ill. 492; *Siceloff v. Redman's Adm'r*, 26 Ind. 251. See article by Albert Martin Kales in 4 Ill. Law Rev. 639.

4. 2 Blacks. Comm. 398; *Mason v. Pate's Ex'r*, 34 Ala. 379; *Watts v. Clardy*, 2 Fla. 369; *Smith v. McCormick*, 46 Ind. 135; *Slade v. Patten*, 68 Me. 380, 5 Gray, Cas. on Prop. 615; *Powell v. Brandon*, 24 Miss. 343; *Morris v. Beyea*, 13 N. Y. 273; *Dott v. Cunningham*, 1 Bay, 453; *Polk v. Faris*, 17 Tenn. 209, 30 Am. Dec. 400; *Butterfield v. Butterfield*, 1 Ves. 133, 27 Eng. Reprint, 938. See, however, *Crawford v. Wearn*, 115 N. Car. 540; *Clemens v. Hecksher*, 185 Pa. St. 476.

5. From the French, *bailleur*, to deliver. 2 Blacks. Comm. 451.

A bailment frequently is defined as a delivery of personal property in trust for some special purpose; but while a bailee's position may be in the nature of a trust, a bailment is not holding in trust any more than a tenant of land holds it in trust for his landlord. The beneficial interest in the bailed articles is not necessarily in the bailor, but the bailee himself may, and frequently does, receive the benefit.

estates from year to year, estates at will, or estates by sufferance. These designations are not applied to chattels personal, but such corresponding interests are bailments.

The general owner of the article is called the bailor; and the person in possession, the bailee, the latter having a qualified or special property.⁶ Two or more persons can have a special property at the same time; as where the original bailee delivers the article to some other person for some temporary purpose.⁷ Calling absolute property a "bundle of rights," special property is detaching,⁸ as it were, one (or more) of the rights from the bundle and placing it in the hands of another. In this way the absolute property is severed into two or more special properties; but the former absolute owner, who retains the ultimate proprietary right, and has become a special owner, is said to retain the "general"⁹ property.

As a general rule, to constitute a bailment the very identical thing delivered to the bailee is to be redelivered by him. If there is no duty upon the bailee to return the specific article it is not a bailment,¹⁰ but some other transaction, depending upon the circumstances. To this general rule there are a few exceptions in the case of articles which are intangible, such as shares of corporate stock; or fungible goods, which are articles sold by weight, measure, or count, indistinguishable from each other by any physical difference in size, shape, texture, or quality, such as grain.¹¹ In such cases all that is required

6. *Magee v. Toland*, 8 Port. 36; 2 Blacks. Comm. 395.

7. *Poole v. Symonds*, 1 N. H. 289.

8. Special property is *ius in re aliena*. Campbell, Sales (2d ed.) 39.

9. *Wright v. Ross*, 36 Cal. 414.

10. *Smith v. Clark*, 21 Wend. 83, 1 Gray, Cas. on Prop. 110; *Chase v. Washburn*, 1 Ohio St. 244, 1 Gray Cas. on Prop. 112.

11. *Baker v. Brown*, 17 Ind. App. 422; *Nelson v. Brown*, 44 Iowa, 455, 1 Gray, Cas. on Prop. 118, 53 Iowa. 555; *Piazek v. White*, 23 Kans. 621; *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. 209, 7 L. R. A. 529;

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of the bailee is that he keep on hand and redeliver an equal amount of the same kind as that delivered to him.¹² The fact that the article is to be redelivered in an altered form does not prevent the transaction from being a bailment.¹³

§ 124. Bailments—Kinds. Bailments are of three kinds, those for the sole benefit of the bailor, those for the sole benefit of the bailee, and those for the mutual benefit of both of these parties. A bailment for the sole benefit of the bailor is really a gift of services by the bailee; as where the owner of a package requests another to keep it gratuitously for him for a time. A bailment for the sole benefit of the bailee is really a gift by the bailor of the use of property; as where a person borrows a horse. Mutual benefit bailments are the most common; and a transaction will be construed as belonging to this class if it can be done reasonably. Thus if a traveler leave his valise at an express office to be cared for temporarily, it is not unreasonable to suppose that the wil-

Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430; *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. 706, *Lawson, Cas. on Pers. Prop.* 334; *Young v. Miles*, 20 Wis. 615.

12. The law is stated in the Uniform Warehouse Receipts Act as follows:

"§23. If authorized by agreement or by custom, a warehouseman may mingle fungible goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole.

"§24. The warehouseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent under the same circumstances as if the goods had been kept separate.

"§58. 'Fungible goods' means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit."

13. As where wheat is delivered and flour is to be returned. *Foster v. Pettibone*, 7 N. Y. 433, *Pattee, Illus. Cas. in Personalty*, 100. A delivery of milk from which butter and cheese are to be returned, is a bailment. *First B'k v. Schween*, 127 Ill. 573, 11 Am. St. 174.

lingness of the proprietor to look after it, arises from a hope or expectation that the traveler may engage his services later. Mutual benefit bailments arise in many ways. A person may hire the use of an article, as a horse; he may have something done to an article, as delivering a horse to a blacksmith to be shod; he may hire someone to take care of an article, as delivering a horse to a liveryman to be cared for; he may hire the carriage of an article, as delivering the horse to a railway company for transportation; or he may deliver an article as a pledge, as giving a horse as security for money borrowed.

§ 125. Bailments—Redelivery. A bailment may be for a definite or for an indefinite time. In the case of a mutual benefit bailment for a definite time, the bailor is not entitled to the possession of the article, without the consent of the bailee, until the expiration of that time, except in a few cases, such as where the bailee is using the article improperly.

A bailee, as a general rule, cannot dispute the title of his bailor; and he is liable for a failure to return the article, except in a few instances in which such failure results from the act of God or the like. In the absence of agreement, redelivery is to be made to the person from whom the bailee has received the article; but the bailee may be instructed to deliver the property to another person, as where goods are delivered by the seller thereof to a carrier to be delivered to the buyer.

§ 126. Quasi Bailments. Sometimes the owner of property loses possession thereof involuntarily, in which case the possession by another is designated as a *quasi-bailment*, as where lost property is in possession of a finder thereof; or property has been taken by an officer of the law, as a sheriff; or property in possession of a receiver.

§ 127. Interests as to Time of Enjoyment. With respect to the time of enjoyment, interests in **personalty**

may be divided into those in possession and those in expectancy, the former arising where there is a right to immediate enjoyment, the latter where the right to enjoyment is postponed. Most interests are in possession, and comment thereon is unnecessary. Interests in expectancy, or future interests, are Remainders and Reversions.

§ 128. **Remainders.** Under the old common law a limitation of a remainder in personalty was void,¹ whether the preceding interest was for life or only for a day; and the person first taking acquired the entire interest; but now future² interests are valid. A Remainder is an interest limited to commence in possession at a future day on the determination of a precedent estate created at the same time; and is either vested or contingent.³ A Vested remainder is one in which there is an immediate fixed right of future enjoyment; a Contingent remainder is one in which the right of enjoyment depends upon an event which may not happen. If the remainderman is certain, a remainder is not contingent merely because he may not outlive the life tenant;⁴ his interest is vested; he can transfer it to another; and, upon his death before the life tenant, it would pass to his next of kin. A contingent remainder, where the contingency is not in regard to the person, likewise, is transmissible⁵ upon the death of the remainderman before the contingency happens.

1. *Maulding v. Scott*, 13 Ark. 88, 91, 56 Am. Dec. 298, 299; *Duke's Ex'rs v. Dyches*, 16 S. Car. Eq. (2 Strobb. Eq.) 353 n, 5 Gray, Cas. on Prop. 145.

2. *Crean v. McMahon* (Md. 1907), 14 L. R. A. N. S. 798; *Solomons v. United States*, 21 Ct. Cl. 481.

A lease for years may be made to commence *in futuro*. 2 Blacks. Comm. 143.

3. *Hill v. Hill*, 10 S. Car. Eq. (Dudl. Eq.) 71, 5 Gray, Cas. on Prop. 153.

4. *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102.

5. A remainder given to a class, as "sons", will go to those in existence at the time the instrument creating it becomes effective.

§ 129. **Reversions.** A Reversion is the residue left in the person creating a life estate or an interest for a shorter period, commencing on the determination of the estate so created. Thus, where a gift of property is made for life, without more, upon the death of the life tenant the interest in such property reverts to the person who owned the property at the time he created the life estate;⁶ or, if he be dead, then to those entitled to his personal property.⁷ The distinction between a remainder and reversion is that in the former a third person is designated expressly to take the property after the termination of the prior estate; while in a reversion the original owner retakes the property whether expressly designated or not.

§ 130. **Interests with Respect to the Number of Owners.** With respect to the number⁸ of owners, personal property may be owned in severalty, in common, in partnership, as part owners, in joint tenancy, in entirety, or in community. Many of these interests resemble the corresponding estates in land, and it will not be necessary to go into detail in regard to the points which are identical.

§ 131. **Severalty.** If property be owned by one person, he is said to own in severalty, that is, his rights are severed and distinct, as to that particular property, from the rest of the world, that being the manner in which most property is owned.

M'Meekin v. Brummet, 9 S. Car. Eq. (2 Hill Ch.) 638, 5 Gray, Cas. on Prop. 148.

6. *Anonymous*, 3 N. Car. 161, 5 Gray, Cas. on Prop. 142. A grant of an annuity to a person without words of limitation, is a grant during life. *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207; *Anderson v. Hammond*, 70 Tenn. 281, 31 Am. Rep. 612; *Savery v. Dyer*, Ambl. 139, Dick. 162.

7. *Byrne v. McGrath*, 130 Cal. 316, 80 Am St. 127.

8. 2 Blacks. Comm. §99.

§ 132. **Tenancy in Common.** If property is owned by two or more persons at the same time, there are various designations given to such owners according to their rights in the property. If they hold undivided, though unequal interests, they are tenants in common.⁹ Tenancy in common may arise in various ways, as by a transfer¹⁰ of property to two or more. Members of a voluntary association owning property are tenants in common having equal rights therein.¹¹ Property of two or more, mixed by consent and incapable of identification, such as grain¹² or sheep,¹³ make the original owners tenants in common of the mixture, their interests therein being in proportion¹⁴ as the original quantity of each bears to the whole.

Where two or more own property together, each, at common law, was entitled to possession of the whole property,¹⁵ the one actually in possession being a bailee¹⁶ as to the interests of the others, and the actual possession by one being constructive¹⁷ possession by the others. So

9. *Eyre v. Higbee*, 35 Barb. 502, 22 How. Pr. 198. Tenancy in common may exist in literary property; *Oertel v. Wood*, 40 How. Pr. 10, 17; in a patent; *Fraser v. Gates*, 118 Ill. 99, 112; in a crop; *Greel v. Kirkham*, 47 Ill. 344; and in mortgages. *Howard v. Chase*, 104 Mass. 249; *Welch v. Sackett*, 12 Wis. 243, *Griffin*, Cas. on Pers. Prop. 176.

10. *McLeod v. Free*, 96 Mich. 57, *Van Zile*, Illus. Cas. on Personalty, 44.

11. *Benjamin v. Stremple*, 13 Ill. 466.

12. *Sexton v. Graham*, 53 Iowa, 181, 1 Gray, Cas. on Prop. 120.

13. *Manti B'k v. Peterson*, 33 Utah, 209, 126 Am. St. 817.

14. *Cushing v. Breed*, 96 Mass. 376, 92 Am. Dec. 777, *Lawson*, Cas. Pers. Prop. 483; *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. 209, 7 L. R. A. 529.

15. *Grigsby v. Breckinridge*, 65 Ky. 480, 92 Am. Dec. 509; *Smith v. Smith*, 25 Va. (4 Rand.) 95, 8 Va. Rep. Ann. 48.

One executor has as much right to hold the assets of an estate as another. *Sanford v. Sanford*, 45 N. Y. 723.

16. *Lobdell v. Stowell*, 51 N. Y. 70, 37 How. Pr. 96; *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. 706, *Lawson*, Cas. Pers. Prop. 334.

17. *Brown v. Graham*, 24 Ill. 628; *Burgess v. Heape*, 1 Hill (8 S. Car. Eq.) 297.

long as the co-tenant in possession did no more than use the property in a proper manner, although such use totally excluded his co-tenants from its enjoyment, he was not liable to them in any way,¹⁸ but he could continue in possession until another co-tenant acquired possession without committing a trespass. The injustice of this rule has been remedied by statute¹⁹ in some states.

Where one co-tenant has expended necessary labor for the common benefit, he is entitled to compensation from the others.²⁰ One co-tenant can sell,²¹ mortgage,²² or otherwise transfer his undivided interest without affecting the rights of the other co-tenants therein, or such undivided interest can pass by operation of law,²³ in any of these instances the transferee becoming a tenant in common with the other co-tenants.²⁴ One co-tenant cannot dispose of more than his undivided interest²⁵ without the consent of the others;²⁶ and if he attempts to do so the other co-tenants may follow²⁷ the property into the hands of the transferee; or, in such cases, and in the case of one co-tenant losing or destroying²⁸ the common prop-

18. *Smith v. Rice*, 56 Ala. 417; *Mosely v. Cheatham*, 62 Ark. 133; *Gaar v. Hurd*, 92 Ill. 315; *Swain v. Knapp*, 34 Minn. 232; *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501.

19. *Benjamin v. Stremple*, 13 Ill. 466.

20. As for collecting wood owned in common, washed down by a freshet. *Moore v. Erie Co.*, 7 Lans. (7 N. Y. Supr.) 39, *Pattee*, Illus. Cas. in Personalty, 141.

21. *Jones v. Scott*, 2 Ala. 58; *Brown v. Graham*, 24 Ill. 628; *Croasdale v. Von Boyenburgh*, 195 Pa. St. 377; *Tunno v. The Betsina*, 24 Fed. Cas. No. 14,236, 5 Am. Law Reg. 406.

22. *Keables v. Christie*, 47 Mich. 594; *Kelley v. Maxwell*, 7 Ohio St. 239.

23. *Hopper v. McWhorter*, 18 Ala. 229; *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501.

24. *Smith v. Rice*, 56 Ala. 417; *Wilson v. Brannan*, 27 Cal. 258; *Brown v. Graham*, 24 Ill. 628.

25. *Graham v. Cook*, 48 Ala. 103; *Wetherow v. Lord* (N. Y.), 41 App. Div. 413.

26. *Bradshaw v. The Sylph*, 3 Fed. Cas. No. 1,791.

27. *Coursin's App.*, 79 Pa. St. 220.

28. *Hyde v. Stone*, 7 Wend. 354, 22 Am. Dec. 532.

erty, the other co-tenants could bring suit against the co-tenant so exercising unlawful acts of ownership.²⁹

In co-ownership the tenants can make a voluntary partition of the property in bulk, if it is susceptible of division, so that each will own his proportion in severalty; or by joining in a sale of it if it is not capable of division, and dividing the proceeds. If the common property consists of fungible goods, that is, articles indistinguishable from each other in size, shape, texture, or quality, and such as usually are sold by weight, measure, count, and the like, one co-tenant has a right to separate³⁰ his share without consulting the others; or can maintain trover³¹ for his share if his co-tenants have possession and refuse to allow him to make separation. If the common property is not susceptible of division, any one of the co-tenants can compel partition in chancery,³² the court entering a decree ordering a sale of the property and a division of the proceeds.

§ 133. **Partnership.** When property is owned in partnership, it is not owned by the firm as an entity but by the partners as individuals, their interests being similar to those of tenants in common. The property is subject to the rules governing partnerships, such as that, in the absence of express restrictions, each partner has implied authority from the others to transfer¹ it; and that before any partner can take any portion as his own, the claims of firm creditors must be satisfied and the accounts of

29. *Needham v. Hill* (1879), 127 Mass. 183; *White v. Osborn*, 21 Wend. 72; *Coursin's App.*, 79 Pa. St. 220; *Cedil v. Clark*, 47 W. Va. 402, 81 Am. St. 802.

30. *Moore v. Erie Co.*, 7 Lans. (7 N. Y. Supr.) 39, *Pattee*, Illus. Cas. in *Personalty*, 141; *Young v. Miles*, 20 Wis. 615.

31. *Lobdell v. Stowell*, 51 N. Y. 70, 37 How. Pr. 96.

32. *Marshall v. Crow's Adm'r*, 29 Ala. 278; *Smith v. Smith*, 25 Va. (4 Rand.) 95, 8 Va. Rep. Ann. 48.

1. *Jones v. Sims*, 6 Port. 138; *Milton v. Mosher*, 48 Mass. 248; *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501; *Coursin's App.*, 79 Pa. St. 220.

the partners among themselves adjusted.² On dissolution of the partnership the partners are entitled to the property in proportion to, and to the amount of, their original contributions, even though it require payment by some of the partners to make up a deficiency. If a partner did not contribute property he would not be entitled to any on dissolution, though his rights over the property during the continuation of the partnership would be the same as if he had made a contribution, but he would have a share in any surplus or profits over the original contributions.

§ 134. **Part Owners.** If a vessel is owned by two or more they are designated as "part owners," their relation being very nearly the same as tenants in common.³ They are not partners by reason of ownership alone, although a vessel may be owned as any partnership property,⁴ in which case their rights would be governed by that law of partnership.⁵ Until the contrary is shown,⁶ part-owners are presumed to own equally.⁷

In case of dispute the owner or owners of a majority of interest have the right to possession⁸ and can govern and control the employment of the vessel;⁹ but if the minor-

2. *Nichol v. Stewart*, 36 Ark. 612.

3. *Owens v. Davis*, 66 La. (15 La. Ann.) 22; *Coursin's App.*, 79 Pa. St. 220.

4. *Jones v. Pitcher*, 3 Stew. & P. 135, 24 Am. Dec. 716; *Nugent v. Locke*, 4 Cal. 318; *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Hewitt v. Sturdevant*, 43 Ky. 459; *Patch v. Wheatland*, 90 Mass. 102; *Mumford v. Nicoll*, 20 Johns. 611; *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139; *Donovan v. Dymond*, 3 Woods, 141; *Wright v. Hunter*, 1 East, 20.

5. *Jones v. Sims*, 6 Port. 138; *Lamb v. Durant*, 12 Mass. 56, 7 Am. Dec. 31; *Thomas v. Clark*, 2 Stark. 451, 3 Eng. Com. Law, 484.

6. *Whiton v. Spring*, 74 N. Y. 169; *The Ship Betsy*, 23 Ct. Cl. 277; *Ex parte Jones*, 4 M. & S. 450.

7. *Glover v. Austin*, 19 Mass. 221; *Alexander v. Dowie*, 1 H. & N. 152, 37 Eng. Law & Eq. 549.

8. *The New Draper*, 4 C. Rob. 287.

9. *Loring v. Illsley*, 1 Cal. 24; *Gould v. Stanton*, 16 Conn. 12; *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. 101; *Jouanneau v. Shannon*,

ity expressly dissent ¹⁰ to the manner of employment as proposed by the majority, the minority do not bear any part of the expenses or losses resulting therefrom, and can exact from the majority security ¹¹ for the safe return of the vessel, though, in that event, the minority forfeit their share in the earnings from such employment,¹² being also denied compensation for the use of the vessel.¹³ If the conflicting interests are equal, possession will not be changed from one moiety to another;¹⁴ and if agreement as to the method of employment is hopeless, a Court of Admiralty will order a sale.¹⁵ If the co-owners dispute, not as to the manner of employment, but whether the vessel shall be employed at all, control will be given to those favoring employment, even though a minority,¹⁶ as employment is in the interest of the public.¹⁷

§ 135. Joint Tenancy. The peculiar feature of joint tenancy is the right of survivorship ¹ (*jus accrescendi*), that is, upon the death of one joint tenant, his interest

55 La. (4 La. Ann.) 330; Hall v. Thing, 23 Me. 461; McKee v. Kinney, 34 Mo. 125; Ward v. Ruckman, 36 N. Y. 26, 93 Am. Dec. 479; The Orleans v. Phoebus, 36 U. S. 175; Robinson v. Thompson, 1 Vern. 465.

10. Swain v. Knapp, 34 Minn. 232.

11. Swift v. Tatner, 89 Ga. 660, 32 Am. St. 101; Paynter v. Paynter, 7 Phila. 336; The Marengo, 1 Sprague, 506.

12. Willings v. Blight, 2 Pet. Adm. 288; Davis v. Johnston, 4 Sim. 539.

13. Swain v. Knapp, 34 Minn. 232; Lewis v. Kinney, 5 Dill. 159.

14. Southworth v. Smith, 27 Conn. 355, 71 Am. Dec. 72; Bradshaw v. The Sylph, 3 Fed. Cas. No. 1,791; Elizabeth & Jane, 1 W. Rob. 278.

15. Coyne v. Caples, 7 Sawy. 360.

16. Orleans v. Phoebus, 36 U. S. 175.

17. Tunno v. The Betsina, 24 Fed. Cas. No. 14,236, 5 Am. Law Reg. 406.

1. Sanford v. Sanford, 45 N. Y. 723; Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373; Clarke v. Robinson, 16 R. I. 180.

A deposit in a bank to the credit of two or more persons, the survivor to take the whole, makes them joint tenants. Kelly v. Beers, 194 N. Y. 49, 128 Am. St. 543; Whitehead v. Smith, 19 R. I. 135.

accrues at once to the surviving tenant or tenants until ultimately the property would be owned by the last survivor in severalty, unless, in the mean time, the joint tenancy had been terminated in some way. Property held by two or more trustees, executors, administrators, guardian, and the like, is held in joint tenancy, it being very well adapted to such relations. The drift of policy and opinion is adverse² to the doctrine of survivorship; and statutes³ have been enacted in some states changing joint tenancies to tenancies in common, with certain exceptions, unless the intention to create a joint tenancy is clear.

§ 136. **Entireties.** Another estate recognized by the common law is an estate by entireties,⁴ which is one wherein two human beings—husband and wife, are interested equally, but they, in law, being one person, the estate technically is in but one person, hence the name. An estate in entirety resembles a joint tenancy in that by the death of one of the spouses the survivor acquires an estate in severalty, but is distinguished⁵ therefrom in that a joint tenancy may include any number of individuals who may be all of one sex and of any age, any of whom can transfer his interest, and upon the death of a joint tenant his share is taken by survivorship; a tenancy by entirety cannot include more than two who must be of different sex and intermarried; neither can trans-

2. *Walt v. Bovee*, 35 Mich. 425, Van Zile, Illus. Cas. on Personality, 43.

3. *M'Meeke v. Brummet*, 9 S. Car. Eq. (2 Hill Eq.) 638, 5 Gray, Cas. on Prop. 148.

4. *Draper v. Jackson*, 16 Mass. 466; *Craig v. Craig*, 3 Barb. Ch. 104; *Cowper v. Scott*, 3 P. Wms. 121.

A tenancy by the entirety may exist in a promissory note; *Shields v. Stillman*, 48 Mo. 86; a judgment; *Bond v. Simmons*, 3 Atk. 21; and crops. *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254.

5. A joint tenancy is distinguished by four unities; a tenancy by entirety, by five. *Freeman, Co-tenancy* (2d ed.) 127, § 64.

fer his interest so as to affect the other, without the consent of the other, and partition cannot be enforced by one. The surviving spouse merely continues holding the entire estate without acquiring a new estate. Death of one spouse simply reduces the one legal person owning the estate to one human being instead of two as formerly.⁶ A bequest to husband and wife is sufficient to make them tenants of the entirety;⁷ and if a legacy be given to G., his wife and two children, the husband and wife together, being one in law, take one-third only, and each of the children would be entitled to one-third⁸ instead of one-fourth. The estate is dissolved by divorce⁹ as that terminates the relationship, dividing the legal unity into two parts.

§ 137. **Community.** In the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, and in Porto Rico, Philippine Islands, and Quebec,¹⁰ a system of community property exists, all property, such as the earnings,¹¹ acquired by the industry of either the husband or the wife or both, belonging beneficially to both during the continuance of the marriage relation, the matrimonial union being regarded somewhat in the nature of a partnership.¹² The produce and in-

6. Freeman, Co-tenancy (2d ed.) 128, § 64.

7. Freeman, Co-tenancy (2d ed.) 134, § 69; *Hamm v. Meisenhelter*, 9 Watts. 350.

8. *Gordon v. Whieldon*, 18 L. J. Ch. 5, 11 Beav. 170; Freeman, Co-tenancy (2d ed.) 135, § 70.

9. Freeman, Co-tenancy (2d ed.) 143, § 76.

10. *Bastien v. Filiatrault*, 31 Can. Sup. Ct. 129, aff'g 15 Quebec Super. Ct. 445.

11. *Fennell v. Drinkhouse*, 131 Cal. 447, 82 Am. St. 361; *Manning's Suc.*, 107 La. 456; *Adams v. Baker*, 24 Nev. 375; *Cooke v. Bremond*, 27 Tex. 457, 86 Am. Dec. 626; *Yake v. Pugh*, 13 Wash. 78, 52 Am. St. 17.

12. *Cartwright v. Hollis*, 5 Tex. 152. The husband is a sort of *quasi-trustee* of the community property.

case of community property becomes community property; and community property is likewise responsible for losses.¹³ Property owned by either spouse at the time of marriage remains separate property.¹⁴ Community property is dissolved by the death¹⁵ of either spouse or by divorce.¹⁶

§ 138. **Interests with Respect to the Terms and Manner of Enjoyment.** With respect to the terms on which they are held or the manner of enjoyment, interests are either absolute, on condition, or on contingency.¹ An absolute interest is one held free from conditions and contingencies, except those imposed by law on all property. Most property is owned absolutely, and comment thereon is unnecessary.

An estate may be defeated by a condition, as where a life estate is given to one person with a provision that if he endeavors to sell or to incumber it the property shall

The system prevailed in Spain and France, and naturally was engrafted on the law of their American colonies which ultimately became the states in which the system is in force.

13. *Oregon Co. v. Sagmeister*, 4 Wash. 710, 19 L. R. A. 233.

14. *George v. Ransom*, 15 Cal. 322, 76 Am. Dec. 490; *Welder v. Lambert*, 91 Tex. 510.

The husband cannot dispose of his wife's separate property; *Stone v. Sledge*, 37 Tex. 49, 47 Am. St. 65; but if separate property is so commingled with community property that it cannot be traced, it becomes community property. *Reid v. Reid*, 112 Cal. 274; *Brown v. Lockhart* (N. Mex. 1903), 71 Pac. 1086; *Robb v. Robb* (Tex. Civ. App. 1897), 41 S. W. 92.

15. *Thompson v. Vance*, 110 La. 26; *Hill v. Young*, 7 Wash. 33; *King v. McHendry*, 30 Can. Sup. Ct. 450.

16. *Biggi v. Biggi*, 98 Cal. 35, 35 Am. St. 141; *Bedal v. Sake*, 10 Idaho, 270, 66 L. R. A. 60; *Barnett v. Barnett*, 9 N. Mex. 205; *Moor v. Moor*, 24 Tex. Civ. App. 150.

1. Practically there is no distinction between a condition and a contingency though the former is performed and the other happens. *Hill v. Hill*, 10 S. Car. Eq. (Dudl. Eq.) 71, 5 Gray, Cas. on Prop. 153.

pass to others;² but a condition, to be of effect, must not be illegal.³

The words "absolute"⁴ and "general" frequently are used interchangeably in regard to interests in personal property; and the same is true as to the words "qualified," "special," "limited," "conditional," and "contingent." It may have been noticed that these words have been used in more than one sense;⁵ first, with regard to the nature of the article and its susceptibility to ownership; second, with regard to possession; and, lastly, with respect to the peculiar circumstances and situation of the person interested. Thus, it is said that absolute ownership cannot be acquired in a wild animal, and that the property in such an animal prior to its being reclaimed is special only, and conditional on possession not being lost. Also it is said that the bailee of an article has only a special, qualified or limited property therein. Suppose a horse is given to a young man on condition that he abstain from the use of intoxicating liquors for one year, and the young man keeps the horse in a livery-stable. In one sense his ownership is conditional for his

2. *Waldo v. Cummings*, 45 Ill. 421. This would be a condition subsequent from the standpoint of the life tenant, for it is within his power to abstain from selling or incumbering the property; but the act of the life tenant in attempting to sell or to incumber the property would be a contingency precedent from the standpoint of the person taking under the limitation over, for the acts of the life tenant are beyond the control of such person; and if the contingency happens, the limitation over becomes effective.

3. An agreement that the owners of railroad stock shall give control of the road to certain persons, is void as against public policy. *Morel v. Hoge*, 130 Ga. 625, 16 L. R. A. N. S. 1136.

4. Absolute property sometimes is defined as possession in one or more persons having the right thereto free from any rights existing in any other persons and without any restrictions upon the use of the property and its disposition except such, as has been seen, is placed by law upon all property. See 2 Blacks. Comm. 388; *Magee v. Toland*, 8 Port. 36; *Griffith v. Charlotte Co.*, 23 S. Car. 25, 55 Am. Rep. 1, 24 Am. Law Reg. 536.

5. *Magee v. Toland*, 8 Port. 36.

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interest may be defeated by his non-performance of the condition subsequent in not abstaining from the use of intoxicating liquors. In another sense his ownership is absolute, as, the horse not being wild, ownership would not be lost if the horse wandered away. In a third sense the young man's interest may be called general or special; for although he has the ultimate, proprietary right in the horse, he has given a special, limited or qualified property to the keeper of the livery-stable. So viewed in different lights, the young man's ownership is, at one and the same time, absolute, conditional, general, special, qualified, and limited. The context, however, usually prevents confusion.

§ 139. **Legal and Equitable Estates.** With respect to the character of the court recognizing and enforcing them, interests in property are divided into legal⁶ and equitable.⁷ The interest is termed legal when the rights of the person interested therein will be recognized and enforced by a court of common law; and equitable when recognized and enforced by a court of equity only. Equitable estates usually exist as trusts, the legal title to the property being in one person known as a trustee, and the equitable title being in another person known as the *cestui que trust*.⁸ The trustee has the possession and management of the property, but the benefit therefrom must be given to the *cestui que trust*, it being his rights that the common law courts refused to recognize and which were enforced by a court of chancery only.

6. The use here of the term "legal" does not indicate that other estates are "illegal."

7. *First B'k v. Hummel*, 14 Colo. 259, 20 Am. St. 257, 8 L. R. A. 788; *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Barker v. Frye*, 75 Me. 29; *Faxon v. Durant*, 50 Mass. 339.

8. *Rice ads. Burnett*, 1 Spears Eq. 579, 42 Am. Dec. 336. *Cestui que trust* (French, meaning, he who trusts) is pronounced *sess-too-ee kwee trust*; and the plural is *cestuis que trustent*.

CHAPTER VIII.

HOW PROPERTY COMES INTO EXISTENCE.

§ 140. **Tangible Personalty Was, and Will Be, Realty.** Having considered what property is, and the restrictions placed thereon, it next will be shown how it arises or is brought into existence, how transferred, and how lost. In treating of the methods by which property is brought into existence it will be necessary to distinguish between the two meanings of property—"things owned" and "ownership." In the sense of "things owned," tangible personal property originally must have come from real property. In ages past, before the existence of a human race, everything must have been realty; and ultimately all tangible personal property now existing must become realty.¹ It is evident, then, that all tangible personal property came into existence by severance from the earth; and at the present time any real property can be turned into personal property by severance,² the only limit being the capacity of human beings to make the severance.

1. We cannot imagine anything more personal than our own bodies, yet even they came from the earth. "Dust thou art, and unto dust shalt thou return." Gen. iii, 19.

2. *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90 (house); *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312 (grain); *Hallett v. Hallett*, 8 Ind. App. 305 (timber); *Learned v. Ogden*, 80 Miss. 769, 92 Am. St. 621 (trees); *Hancock County v. Imperial Co.* (Miss. 1908), 17 L. R. A. N. S. 693 (crude resin); *Ward v. People*, 6 Hill, 144 (ice). Water diverted from natural streams into pipes becomes personal property; and appeal from a judgment of a justice of the peace cannot be based on the theory that title to real property is involved. *Hesperia Co. v. Gardner*, 4 Cal. App. 357. Oil underground becomes personal property when it reaches a well. *Kelly v. Ohio Co.* (Ohio 1897), 49 N. E. 399.

§ 141. Severance—Actual and Constructive. Severance may be actual or constructive. Actual severance occurs when all connection with the soil is completely broken in fact; constructive severance exists when an article remains annexed to the soil, but, by a fiction of law designed to carry out the intention of all interested parties who have entered into agreement express or implied in regard to it, is treated as though it had been dis-united.³

Actual severance, however, is not always sufficient to constitute an article personal property in the eyes of the law.⁴ A mere accidental⁵ severance, or an intentional severance for a temporary⁶ purpose, will not be sufficient to cause an article to be regarded as personal property in every case. Likewise, to impress the characteristics of personalty upon a severed article, the severance must be made by one who had a right⁷ to sever it.

3. *Hensley v. Brodie*, 16 Ark. 511; *Banfil v. Twyman*, 71 Ill. App. 218, aff'd 172 Ill. 123; *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. 409; *Corcoran v. Webster*, 50 Wis. 125. A sale of fixtures attached to the freehold will effect a constructive severance thereof as between the parties, and they will be treated in law as personal property so far as the sale is concerned; *Ewell, Fixt.* (2d ed.) 65; but the owner of land, by intention alone on his part, cannot constructively sever an article so as to affect others who have acquired interests in the land. *Ewell, Fixt.* (2d ed.) 55.

Constructive severance will not be presumed to continue any longer than is necessary to carry out the intention of the parties; *Holderman v. Miller*, 102 Ind. 356; nor does it alter the actual character of an article so as to make it subject to levy as personalty. *Davis v. Eastham*, 81 Ky. 116, 4 Ky. Law Rep. 850; *McNeill v. Moore*, 7 Tex. Civ. App. 536; *Carson v. Simpson*, 25 Ont. 385.

4. *Ewell, Fixt.* (2d ed.) 62.

5. *Guernsey v. Phinizy*, 113 Ga. 898, 84 Am. St. 270 (fire); *Bainway v. Cobb*, 99 Mass. 457 (decay); *Leidy v. Proctor*, 97 Pa. St. 486.

6. Machinery, so annexed as to be a part of the realty, will not be treated as personal property when severed for the purpose of repairs only. There must be an intention to make the severance of some permanence. *Ewell, Fixt.* (2d ed.) 63.

7. If a stranger sever articles, such as a trespasser cutting down trees, they still will be regarded as realty; *Frank v. Magee*, 100 La.

§ 142. **Accession.** Accession may be the means of property, in the sense of "things owned," being produced which did not have any previous existence as such. The general rule is that the ownership of the offspring of animals follows the ownership of the dam,¹ the Latin maxim being *partus sequitur ventrem*.² Other products

(49 La. Ann.) 1250, 1254, 22 So. 739, 101 La. (50 La. Ann.) 1066, 1069, 23 So. 939; *Duff v. Bindley*, 16 Fed. 178, 180; though the owner of the land could elect to treat them as personal property; *Ewell, Fitt*. (2d ed.) 64; as they are his. *Gates v. Rifle Co.*, 70 Mich. 309, *Griffin, Illus. Cas. on Pers. Prop.* 19, *Van Zile, Illus. Cas. on Personality*, 87; *Gaskins v. Davis*, 115 N. Car. 85, 44 Am. St. 439; *Cecil v. Clark*, 47 W. Va. 402, 81 Am. St. 802 (coal); 4 Blacks. Comm. 233.

1. *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Morse v. Patterson*, 1 Kana. App. 577; *Hanson v. Millett*, 55 Me. 184; *Lewis v. Davis*, 3 Mo. 133, 23 Am. Dec. 698; *Stewart v. Ball's Adm'r*, 33 Mo. 154 (colt); *Tyson v. Simpson*, 5 Tenn. 147; *Ayre v. Hixson* (Oreg. 1908), 98 Pac. 515 (lambs); *Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849; *Arkansas Co. v. Mann*, 130 U. S. 78.

The reason for the rule is that the male frequently is unknown, and also because the dam is almost useless to her owner during the time of her pregnancy; as the owner is a loser through the expense and care of the dam, he should be the gainer by her brood. An exception is made in the case of young swans (cygnets) which belong equally to the owner of the male and the owner of the female, the exception resulting from the fact that the reasons above mentioned do not exist in the case of swans. The male is well known by his constant association with the female, and the owner of the female does not suffer any more disadvantage during the time of nurture than does the owner of the male. 2 Blacks. Comm., 390.

The Roman law was the same as the common law in regard to accession by the pregnancy of animals; 2 Blacks. Comm. 404; and the rule was imported from the civil law. *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165, *Griffin, Cas. on Pers. Prop.* 71.

2. *Gans v. Williams*, 62 Ala. 41; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165, *Griffin, Cas. on Pers. Prop.* 71; *Hughes v. Graves*, 11 Ky. 317. A life tenant of livestock is entitled to the increase thereof; *Patterson v. Devlin*, 13 S. Car. Eq. (McMull. Eq.) 459; but in the case of the bailment of a female animal, the increase belongs to the bailor, unless there was an agreement to the contrary. *Maize v. Bowman*, 93 Ky. 205, 14 Ky. Law Rep. 121, 17 L. R. A. 81. A mortgage of a female animal covers its offspring afterwards born but not weaned at the time the mortgagee takes possession. *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151, *Pattee, Illus. Cas. in Personality*, 95, *Lawson, Cas. on Pers. Prop.* 204, *Van Zile, Illus. Cas. on Personality*,

of an animal, such as wool upon a sheep, belong to its owner; and manure upon a public highway belongs to the owner of the animals which produced it.³ Vegetable⁴ products belong to the owner of the plant producing them.

§ 143. **Intangible Property.** Many kinds of property spring into existence as the result of human action alone. A franchise, which is a special privilege not previously possessed but conferred by the state on individuals, and sometimes becoming of great value, results from the acts of the agents of the state. So inventions and intellectual products generally, trade-marks and goodwill owe their existence to human action entirely. Many intangible rights or choses in action, such as leases and the like, regarded as property in the sense of "things owned," are brought into existence by the act of at least two persons entering into a contract.

§ 144. **Ownership from Occupancy.** Property, in the sense of "ownership," arises from occupancy; that is, where things in existence capable of ownership do not have an owner, they belong to the person who first⁵ takes possession with the intention of regarding himself as the owner. Originally⁶ all ownership must have

41. Likewise, if a levy is made upon a female animal, the young thereof subsequently born is subject to the levy. 2 Freeman, Executions (3d ed.) 1500, § 268.

3. Haslem v. Lockwood, 37 Conn. 500, 9 Am. Rep. 350, Pattee, Illus. Cas. in Personalty, 75, Lawson, Cas. Pers. Prop. 174.

4. These are usually real estate on account of their connection with the ground; but the same principle would be applied to the fruit or other products of a plant which is in a movable receptacle.

5. Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46. The right to the penalty in a *qui tam* action belongs to the first informer, who thus obtains title by occupancy. 2 Blacks. Comm. 437.

6. 2 Blacks. Comm. 400. There are said to have been three steps in reaching the modern idea of property. At first, property rights were recognized only so long as a person had possession. The right of a savage to his war-club continued no longer than he retained it. The instant he laid it down, and possession was obtained by another, the former lost his property, and the latter acquired it so long as his

arisen in this way; but, owing to the cupidity and aggressiveness of the human race nearly everything of practical value has been appropriated, so that title by occupancy in modern times is not common, usually being limited to articles not easily appropriated, as wild animals⁷ and water,⁸ to new natural products, as ice,⁹ and to abandoned¹⁰ property. Ownership of intellectual¹¹ products result from occupancy.

§ 145. What Constitutes Occupancy. What constitutes a sufficient taking possession of an article to give title to occupancy becomes important when two or more claim the same article through such a title.¹² Title to a wild animal¹³ is not acquired by pursuit,¹⁴ nor by merely

possession lasted. This right of property is recognized even by brutes. The next step was to recognize property rights in a person even when not in possession; but that the owner had any interest which could be transferred to another, was too subtle for the human mind in the early ages. If the owner abandoned his property, it then could be acquired by another by occupancy just as the former owner had acquired his. The last step was to recognize that ownership was something which could be transferred to another, by sale, gift, bequest, and the like.

7. *Goff v. Kilts*, 15 Wend. 550, *Pattee, Illus. Cas. in Personality*, 23; *Fleet v. Hegeman*, 14 Wend. 42, *Lawson, Cas. on Pers. Prop.* 101.

8. *Myer v. Whitaker*, 5 Abb. New Cas. 172, 55 How. Pr. 376.

9. *Wood v. Fowler*, 26 Kan. 682.

10. *Wyman v. Hurlbut*, 12 Ohio, 81, 40 Am. Dec. 461. An abandoned trademark may be adopted by another. *Hopkins, Tradem.* (2d ed.) 64.

11. *Rees v. Peltzer*, 75 Ill. 475; *Grigsby v. Breckenridge*, 65 Ky. 480.

12. Title to manure on a highway is gained by gathering it together in piles. *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 75, *Pattee, Illus. Cas. in Personality*, 75, *Lawson, Cas. on Pers. Prop.* 174.

13. Title to bees is gained by hiving them; *Goff v. Kilts*, 15 Wend. 550, *Pattee, Illus. Cas. in Personality*, 23; but title is not gained by marking initials on a tree in which are bees and honey. *Gillett v. Mason*, 7 Johns. 16, *Pattee, Illus. Cas. in Personality*, 28.

14. If a fox, pursued by one, is intercepted and killed by another, it belongs to the latter. Any other rule "would prove a fertile source of quarrels and litigation." *Pierson v. Post*, 3 Cal. 175, 2 Am. Dec. 264, *Pattee, Illus. Cas. in Personality*, 19, *Lawson, Cas. on Pers. Prop.* 164.

wounding ¹⁵ it, as against one subsequently killing it. Title to ice on a public body of water will be obtained by staking it out, surveying, measuring and sweeping it and having it watched.¹⁶ Title cannot be gained by an illegal ¹⁷ act.

15. *Buster v. Newkirk*, 20 Johns. 75, 1 Gray, Cas. on Prop. 25. In this case a deer ran six miles, and then pursuit was abandoned for that day although the dogs subsequently caught it. At the time the dogs seized it by the throat, the deer was killed by another person.

16. *Hickey v. Hazard*, 3 Mo. App. 480, Lawson, Cas. on Pera. Prop. 159. See, also, *Barrett v. Rockport Co.*, 84 Me. 155; *People's Co. v. Davenport*, 149 Mass. 322, 14 Am. St. 425; *Myer v. Whitaker*, 5 Abb. New Cas. 172, 55 How. Pr. 376.

17. Property cannot be acquired in a moose captured in violation of a statute. *James v. Wood*, 82 Me. 175, 8 L. R. A. 448.

Property might come into existence through illegality. See *Julienne v. Tourisac*, 64 La. (12 La. Ann.) 599.

CHAPTER IX.

TRANSFER OF PROPERTY BY ACT OF THE PARTIES.

§ 146. **Voluntary and Involuntary Transfers.** Ownership can be transferred in a variety of ways, which can be grouped under two general heads, namely: Transfer by Act of the Parties, and Transfer by Operation of Law. Transfer by act of the parties may be either Voluntary or Involuntary. A Voluntary transfer is one made at the instance of the transferer, who acts for the purpose of accomplishing it. The most common voluntary transfers of personal property result from contract between two or more parties, from gift, from declaration of trust, or from bequest. Transfers resulting from contract are given various designations, depending upon the character of the property and of the interest transferred, some of the most common being bailments, assignments, negotiations, sales, exchanges, and mortgages.

§ 147. **Assignments in General.** "Assignment" is used in different senses. In its broadest sense it is a transfer of any property, or of any estate or right therein, including real property. In a very narrow sense, it means a transfer of a chose in action. The person making the assignment is the assignor; and the one to whom it is made is the assignee.

Assignments of choses in action were prohibited under the old common law, the reason advanced being that assignments tended to encourage litigation;¹ but, later, they were so far recognized by the common law courts that actions could be brought thereon in the name of the

1. *Hinton v. Nelms*, 13 Ala. 222; *McGoon v. Ankeny*, 11 Ill. 558; *East T. Co. v. Henderson*, 69 Tenn. 1.

assignor "for the use of" ² the assignee. Ultimately this method of bringing suits became a mere matter of form, as the assignee had full control of the proceedings; and now by statute in many states, an assignee can, and sometimes must, bring an action in his own name.³ Not all choses in action are assignable, even under the modern law. While, as a general rule, liquidated money claims are assignable, it is otherwise as to claims arising from personal⁴ torts, or from a contract where a personal⁵ element is involved.

Although good business requires an assignment to be in writing, an oral⁶ assignment is valid; and, if written,

2. *Snead v. Bell*, 142 Ala. 449; *Anderson v. Lewis*, 10 Ark. 304; *Smith v. Russell*, 17 Conn. 107; *Kinniken v. Dulaney*, 5 Harr. 384; *Karrick v. Welmore* (D. C.), 22 App. Cas. 487; *Durant Co. v. Sinclair Co.*, 2 Ga. App. 209; *Brownell Co. v. Critchfield*, 197 Ill. 61; *McLott v. Savery*, 11 Iowa, 323; *Marshall v. Craig*, 6 Ky. 291; *Dugue v. Levy*, 120 La. 369; *Smalley v. Wright*, 44 Me. 442, 69 Am. Dec. 112; *Hart v. Western Corp.*, 54 Mass. 99, 46 Am. Dec. 719; *Lamson v. Marshall*, 133 Mich. 250; *Oldham v. Ledbetter*, 2 Miss. 43, 26 Am. Dec. 690; *Isenhour v. Barton County*, 190 Mo. 163; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307; *Bouvier v. Balto. Co.*, 67 N. J. L. 281, 60 L. R. A. 750; *Thurman v. Wells*, 18 Barb. 500; *Townsend v. Carpenter*, 11 Ohio, 21; *Maginn v. Dollar B'k*, 131 Pa. St. 362; *Clarke v. Thompson*, 2 R. I. 146; *Simpson v. Moulden*, 43 Tenn. 429; *Hagar v. Buck*, 44 Vt. 290, 8 Am. Rep. 368; *Tyler v. Ricamore*, 87 Va. 466; *Wellsburg B'k v. Kimberland*, 16 W. Va. 555; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790; *Dennison v. Knox*, 24 Up. Can. Q. B. 119; *Winch v. Keeley* 1 T. R. 619.

3. *McCabe v. Judd*, 12 N. Y. 622, 1 Gray, Cas. on Prop. 201.

4. *Hunt v. Conrad*, 47 Minn. 557 (false imprisonment); *Pulver v. Harr*, 52 N. Y. 73 (assault.)

5. 2 *Andrews*, Am. Law (2d ed.), 1321, § 689. An assignment cannot be made so as to transfer a right to give the assignee's own notes for the purchase price of machines instead of the assignor's notes. *Rappleye v. Racine Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139.

6. *McAleer v. McNamara*, 140 Iowa, 112; *Little v. Berry* (Ky.), 113 S. W. 902; *Onion v. Paul*, 1 Harr. & J. 114; *Johnson County v. Bryson*, 27 Mo. App. 341; *Sullivan v. Visconti*, 68 N. J. L. 543; *York v. Conde*, 61 Hun, 26; *Taylor v. Smith*, 116 N. Car. 531; *Box v. Lanier*, 112 Tenn. 393, 64 L. R. A. 458; *Clark v. Gillespie*, 70 Tex. 513; *Hutchins v. Watts*, 35 Vt. 360; *Wilt v. Huffman*, 46 W. Va. 473; *Arpin v. Burch*, 68 Wis. 619; *Parton v. Prang*, 3 Cliff. 537.

formality is not required⁷ unless the subject-matter brings it under some particular rule of law requiring it.⁸ As between an assignor and his assignee, the assignment is complete without notice thereof being given to the debtor;⁹ but in such a case the debtor would not be affected¹⁰ by the assignment, and would be protected in any action taken in good faith in regard to the debt, such as payment, while under the belief that his creditor remained unchanged. An assignee takes subject to all equities and defenses which the debtor has at the time the latter receives notice, that is, the assignee does not acquire any greater rights than the assignor had.¹¹ If

7. See *Crook v. First B'k*, 83 Wis. 31, 35 Am. St. 17, *Van Zile's Illus. Cas. on Personalty*, 104.

8. *Steele v. Gatlin*, 115 Ga. 929, 59 L. R. A. 129; *McCallum v. Simplex Co.*, 197 Mass. 388.

9. *Jackson v. Hamm*, 14 Colo. 58; *Bishop v. Holcomb*, 10 Conn. 444; *Odessa B'k v. Taylor*, 8 Del. Ch. 456; *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. 77; *Columbia Co. v. First B'k*, 116 Ky. 364; *Thayer v. Daniels*, 113 Mass. 129; *Quigley v. Welter*, 95 Minn. 383; *Houser v. Richardson*, 90 Mo. App. 134; *Marsh v. Garney*, 69 N. H. 236; *Cogan v. Conover Co.*, 69 N. J. Eq. 809, 115 Am. St. 629, reversing 69 N. J. Eq. 358; *Muir v. Schenck* (N. Y.), 3 Hill, 228, 38 Am. Dec. 633; *Virginia-Carolina Co. v. McNair*, 139 N. Car. 326; *Campbell v. Grant*, 36 Tex. Civ. App. 641; *Eby-Blain Co. v. Montreal Co.*, 17 Ont. L. Rep. 292; *Rodick v. Gandell*, 1 De G., M. & G. 763.

10. *Bostwick v. Bryant*, 113 Ind. 448; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Winberry v. Koonce*, 83 N. Car. 351; *Fraley's App.* 76 Pa. St. 42; *Porter v. Dunlap*, 17 Ohio St. 591; *Stebbins v. Bruce*, 80 Va. 389.

11. *Harrison v. Marshall*, 6 Port. 65; *Myers v. South F. Co.*, 10 Cal. 579; *Watrous v. Hilliard*, 38 Colo. 255; *Lyon v. Summers*, 7 Conn. 399; *Third B'k v. Railroad Co.*, 114 Ga. 890; *Dole v. Olmstead*, 41 Ill. 344, 89 Am. Dec. 386; *Shade v. Creviston*, 93 Ind. 591; *Hipwell v. National Co.*, 130 Iowa, 656; *Strong v. Moore*, 75 Kans. 437; *Gossom v. Sharp*, 37 Ky. 140; *Dannemann v. Charlton*, 113 La. 276; *Warren v. Ireland*, 29 Me. 62; *Goldsborough v. Cradle*, 28 Md. 477; *Sawyer v. Cook*, 188 Mass. 163; *United S. Co. v. Bagley*, 129 Mich. 70, 95 Am. St. 424, 55 L. R. A. 616; *Brady v. Chadbourne*, 68 Minn. 117; *Yazoo Co. v. Wilson*, 83 Miss. 224; *Hill v. McPherson*, 15 Mo. 204, 55 Am. Dec. 142; *Sanborn v. Little*, 3 N. H. 539; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L. R. A. 475; *Martin v. Richardson*, 68 N. Car. 255; *Myerfeld v. Strube*, 9 Ohio Dec. 514; *Jack*

the debtor, at the time of receiving notice of the assignment, has any valid defense which he can oppose against the assignor, such as want or failure of consideration, payment, or fraud, or has a counterclaim, these matters can be set up in opposition to the claim in the hands of the assignee to the same extent as if the assignment had not been made, and this is so even though the assignee has paid full value for the claim, and took the assignment in good faith in ignorance of the defense; but, in such a case, as an assignor impliedly warrants that he has a right to transfer what the assignment purports to transfer,¹² the assignee would have a remedy against him.¹³ After notice, the debtor is obliged to respect the rights of the assignee.

§ 148. **Assignments for the Benefit of Creditors.** Sometimes, for the sake of brevity, an assignment made by a debtor for the benefit of his creditors is spoken of as an "assignment" without more, the circumstances indicating clearly what is meant. An Assignment for the Benefit of Creditors, sometimes called a Voluntary Assignment, is a transfer by a debtor, without compulsion, of his property to a trustee for the purpose of having it applied upon his debts, any excess over his indebtedness to be returned to him.

Assignments for the benefit of creditors are not made illegal by the passage of a National Bankruptcy Act, but

v. National Bank, 17 Okla. 430; *Brower Co. v. Miller*, 28 Oreg. 565, 52 Am. St. 807; *Philadelphia Co. v. Ritter-Conley Co.*, 223 Pa. St. 350; *Loan B'k v. Farmers' B'k*, 74 S. Car. 210; *Weber v. Tschetter*, 1 S. Dak. 205; *Trabue v. Bankhead*, 2 Tenn. Ch. 412; *Russell v. Kirkbride*, 62 Tex. 455; *McCormick v. Sadler*, 14 Utah, 463; *Barney v. Grover*, 28 Vt. 391; *Buckner v. Smith*, 3 Va. (1 Wash.) 296, 1 Am. Dec. 463; *Parmalee v. Wheeler*, 32 Wis. 429; *Judson v. Corcoran*, 58 U. S. 612, 15 L. ed. 231; *Meriden Co. v. Bowell*, 4 Brit. Col. 520; *Davies v. Austen*, 1 Ves. Jr. 247.

12. *Hazer v. Yost*, 54 Ark. 485; *Emmerson v. Claywell*, 53 Ky. 15, 58 Am. Dec. 645.

13. See *People v. Tioga*, 19 Wend. 73, 1 Gray, Cas. on Prop. 197.

are voidable only if proceedings in bankruptcy are instituted.¹⁴ A state statute regulating such assignments may be suspended¹⁵ during the period a bankruptcy act is in force, being revived upon the repeal of the bankruptcy act.

§ 149. **Negotiation.** Negotiation is a term used to designate the transfer of a negotiable instrument, and may be by indorsement or otherwise,¹⁶ depending upon circumstances; but as this method of transfer is treated fully in works on bills and notes,¹⁷ it will not receive further mention here.

§ 150. **Sales—Definition.** "Sale" has two significations.¹ It is used, first, to designate the contract which has for its primary object the transfer of the absolute property in corporeal chattels for a price; second, it is used to designate the transfer itself of the absolute property in corporeal chattels for a price. The word "property" in this definition means the general ownership² of the subject-matter of sale and not the subject-matter itself.

§ 151. **Sales—Subject Matter.**³ In some states all kinds of personal property may be the subject of

14. *Cohen v. American Co.*, 192 N. Y. 227; *Randolph v. Scruggs*, 190 U. S. 533, 47 L. ed. 1165, 10 Am. Bankr. Rep. 3.

While the Nat'l Bankr. Act [Act of July 1, 1898, c. 541, 30 Stat. 544; U. S. Comp. St. 1901, p. 3418] suspends state statutes in reference to voluntary assignments for the benefit of creditors, it does not affect common law assignments; and such an assignment is valid until attacked by proceedings under the Bankruptcy Law, and passes title to the assignee. *Pogue v. Rowe*, 236 Ill. 157.

15. *Harbaugh v. Costello*, 184 Ill. 110, 75 Am. St. 147.

16. *Ogden*, Neg. Inst., 83, § 96.

17. *Ogden*, Neg. Inst., 82, § 94.

1. 1 Mechem, Sales, 463, § 560.

2. Uniform Sales Act, § 76 (1) "Property."

3. A sale is not made of articles (coin, a watch, a compass and promissory notes worth \$3,754.50) concealed in a "drill-machine" sold for fifteen cents by an administrator. *Huthmacher v. Harris's Adm'rs*,

sale; but in others ⁴ a sale technically cannot be made of choses in action, which must be transferred by assignment or by negotiation. Money, unless on account of rarity it may possess a value ⁵ greater than that represented upon its face, cannot be the subject of sale, ⁶ but is governed by rules heretofore given.

§ 152. Sales—Price. The price must be in money terms; ⁷ but it is not necessary that it be paid immediately, it being sufficient if it be promised, either wholly or in part; ⁸ nor need the amount be fixed. If nothing is said about the amount, the law implies a reasonable amount; ⁹ and what is reasonable is to be determined by the circumstances in each particular case. If there be a market-price it generally is the criterion ¹⁰ unless unnaturally inflated or depressed. ¹¹ The parties can agree that the price is to be determined by future market quotations at a specified place; ¹² or that the value is to be decided by a third

38 Pa. St. 491, 80 Am. Dec. 502, *Pattee*, Illus. Cas. in *Personalty*, 78, *Lawson*, Cas. Pers. Prop., 177.

4. *Crawford v. Schmitz*, 139 Ill. 564; *Vawter v. Griffin*, 40 Ind. 593; *Whittemore v. Gibbs*, 24 N. H. 484.

5. *Fowler v. New Y. B'k*, 67 N. Y. 138.

6. See *Uniform Sales Act*, § 76, "Goods."

7. See, *post*, § 194, "Exchanges."

8. *Hayden v. Dwyer*, 47 Minn. 246, *Pattee*, Illus. Cas. in *Personalty*, 218.

9. 1 *Mechem*, Sales, 192, § 207; *Greene v. Lewis*, 85 Ala. 221, 7 Am. St. 42; *Tucker v. Cady*, 25 Ill. App. 578; *Jenkins v. Richardson*, 29 Ky. 442; *Taft v. Travis*, 136 Mass. 95, *Pattee*, Illus. Cas. in *Personalty*, 235; *Lovejoy v. Michels*, 88 Mich. 15, 13 L. R. A. 770; *Livingston v. Wagner*, 23 Nev. 53; *Lefurgy v. Stewart* (N. Y.), 69 Hun. 614; *Bennett v. Adams*, 2 Cranch, C. C. 551, Fed. Cas. No. 1,316; *Hoadly v. McLaine*, 10 Bing. 482.

10. 1 *Mechem*, Sales, 193, § 208; *McEwen v. Morey*, 60 Ill. 32; *Fenton v. Braden*, 2 Cranch, C. C. 550, 8 Fed. Cas. 1140.

11. *James v. Muir*, 33 Mich. 223; *Acebal v. Levy*, 10 Bing. 376, 383.

12. *Daniel v. Hannah*, 106 Ga. 95; *Callaghan v. Myers*, 89 Ill. 570; *Shaw v. Smith*, 45 Kans. 334, 11 L. R. A. 681, *Pattee*, Illus. Cas. in *Personalty*, 375; *Lucas Co. v. Canal Co.*, 148 Pa. St. 227; *Ames v. Quimby*, 96 U. S. 324.

person,¹³ or that the amount received from a subsequent¹⁴ sale is the price to be paid. At common law the price need not be adequate.

§ 153. **Sales—Essentials.** As a contract, a sale must possess all of the essentials of a valid contract, that is, it must originate in a genuine offer and acceptance;¹⁵ the parties must be competent; there must be mutuality;¹⁶ and the object must be legal. As these matters are treated fully in text-books on contracts, they will not be further noticed here.

In *McConnell v. Hughes*, 29 Wis. 537, *Pattee*, Illus. Cas. in *Personalty*, 221, *Ingler*, Cas. in *Sales*, 25, *Griffin*, Illus. Cas. on *Pers. Prop.* 81, the price of wheat was to be ten cents a bushel less than the Milwaukee price on any future day the seller might name. This was held to be sufficient, although the grain burned before a day was named.

13. 1 *Mechem*, *Sales*, 199, § 212; *Willingham v. Veal*, 74 Ga. 755; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173; *New Eng. Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271; *Wilcox v. Young*, 66 Mich. 687; *Leonard v. Cox*, 64 Mo. 32.

If such third person cannot or does not make the valuation, a sale is not effected; *Elberton Co. v. Hawes*, 122 Ga. 858; *Fuller v. Bean*, 30 N. H. 181; *Milnes v. Gery*, 14 Ves. 400, *Ingler*, Cas. in *Sales*, 28; unless the goods have been appropriated by the buyer, in which case he must pay a reasonable price. 1 *Mechem*, *Sales*, 200, § 213; *Hulton v. Moore*, 26 Ark. 382; *Kenniston v. Ham*, 29 N. H. 501, *Ingler*, Cas. in *Sales*, 29; *Brown v. Bellows*, 21 Mass. 189; *Albemarle Co. v. Wilcox*, 105 N. Car. 34; *Humaston v. Telegraph Co.*, 87 U. S. 20, 22 L. ed. 279, *Pattee*, Illus. Cas. in *Personalty*, 230; *Clarke v. Westrope*, 25 L. J. C. P. 287, 18 C. B. 765, 86 Eng. Com. L. 764; *Uniform Sales Act*, § 10, (1).

14. *Foster v. Magill*, 119 Ill. 75, *Ingler*, Cas. in *Sales*, 26; *Phifer v. Erwin*, 100 N. Car. 59. These rules are but an application of the Latin maxim, *Id certum est quod certum reddi potest* (that is certain which can be made certain). 1 *Mechem*, *Sales*, 197, § 210; *Cunningham v. Brown*, 44 Wis. 72; *McBride v. Silverthorne*, 11 Up. Can. Q. B. 545.

15. *Gardner v. Lane*, 94 Mass. 39; *Summers v. Mills*, 21 Tex. 77; *Utley v. Donaldson*, 94 U. S. 29.

16. 1 *Mechem*, *Sales*, 203. D. offered R. a horse for \$165. R. said, "Did I understand you 'sixty-five?'" D., thinking R. referred to the fraction, answered, "Yes." R. took the horse, but refused to pay \$165. *Held*, that there was a mutual mistake of fact and no meeting of the minds; hence, neither party was bound. *Rupley v. Daggett*, 74 Ill. 351

§ 154. **Quasi Contracts of Sale.** In some cases, where some of the essentials of a true contract are lacking, they are implied as a matter of law in order to prevent injustice. These are known as *quasi* contracts. Sometimes the law transfers the title to goods irrespective of agreement. Thus if a judgment in trespass¹⁷ or in trover for the full value of the goods which are the subject of the suit, be obtained against the defendant, which he pays,¹⁸ the title to the goods passes to the defendant, the same relating back to the time of the commission of the wrongful act¹⁹ for which the suit was brought.

A person having an action in tort against another for wrongfully taking property, in some instances may waive the tort and bring an action on an implied promise by the wrongdoer to pay for what has been taken. Such action makes the wrongdoer the owner of the property.

In these cases the element of agreement has been implied by law. In other instances, some other essential may be implied; as the case of a sale of necessities to an infant the law supplies the missing element of capacity.²⁰

17. 1 Mechem, Sales, 75, § 56; Howe v. Johnson, 117 Cal. 41; Elliott v. Hayden, 104 Mass. 181; Brady v. Whitney, 24 Mich. 154; Fox v. Prickett, 34 N. J. L. 17; Thayer v. Manley, 73 N. Y. 305; Lovejoy v. Murray, 70 U. S. 1, 18 L. ed. 129; Brinsmead v. Harrison, L. R. 6 C. P. 584, *aff'd* L. R. 7 C. P. 547.

18. Atwater v. Tupper, 45 Conn. 144; *Ex parte* Drake, 5 Ch. D. 866. It is disputed whether title is transferred by the judgment or by its satisfaction. See Miller v. Hyde, 161 Mass. 472, 42 Am. St. 424, 25 L. R. A. 42; "The Disselsin of Chattels," 3 Harv. L. Rev. 326; Marsh v. Pier, 4 Rawle, 273, 26 Am. Dec. 131; *post*, § 322.

19. Smith v. Smith, 51 N. H. 57, Ingler, Cas. in Sales, 249; *Ex parte* Drake, 5 Ch. D. 866.

20. Guthrie v. Morris, 22 Ark. 411; Gregory v. Lee, 64 Conn. 407, 25 L. R. A. 618, Ingler, Cas. in Sales, 247; Johnson v. Maples, 49 Ill. 101, Ingler, Cas. in Sales, 245; Ayres v. Burns, 87 Ind. 245, 44 Am. Rep. 759; Beeler v. Young, 4 Ky. 519; Stone v. Dennison, 30 Mass. 1, 23 Am. Dec. 654; Decell v. Lewenthal, 57 Miss. 331; Locke v. Smith, 41 N. H. 346; Gay v. Ballou, 4 Wend. 403; Hyman v. Cain, 56 N. Car. 111; Werner's Appeal, 91 Pa. St. 222; Phillips v. Lloyd, 18 R. I. 99; Bouchell v. Clary, 3 Brev. 194; Parsons v. Keyes, 43 Tex. 557; Brad-

§ 155. **Sales—Parties.** The parties to a contract of sale are known as the seller and the buyer, the contract providing for a transfer of the property from the former to the latter. A subsequent purchaser from the buyer before the rights of the seller are extinguished fully, is designated as a sub-buyer, the original buyer occupying the relation of seller to the sub-buyer.

§ 156. **Sales—Classification.** As a contract, sales are classified as executed and executory, and as express and implied. As a transfer of ownership, they are classified into absolute, conditional and contingent;²¹ public and private;²² and voluntary and forced²³ or involuntary.

An Executed Sale, or a Bargain and Sale, is one in which the ownership of the subject-matter has passed to the buyer though the subject-matter itself may not have been delivered or the price paid. An Executory Sale, or an Agreement to Sell, is one in which the ownership has not passed to the buyer,²⁴ notwithstanding the fact that the subject-matter may be in the possession of the buyer, or the price may have been paid. As soon as the ownership of the subject-matter of an executory sale passes to the buyer, the sale changes to an executed one.²⁵

ley v. Pratt, 23 Vt. 378; Jones v. Valentines' Sch., 122 Wis. 318, 320; Hyer v. Hayatt (U. S.), 3 Cranch C. C. 276; Whywall v. Champion, 2 Str. 1083.

21. A sale of goods "to arrive" is not an undertaking by the seller that they shall arrive, but is contingent on their arrival. Neldon v. Smith, 36 N. J. L. 148; Abe Stein Co. v. Roberston, 167 N. Y. 101; Rogers v. Woodruff, 23 Ohio St. 632, 13 Am. Rep. 276; Johnson v. McDonald, 9 M. & W. 600.

22. 1 Mechem, Sales, 11, § 10.

23. 1 Mechem, Sales, 10, § 8.

24. Hatch v. Oil Co., 100 U. S. 124, 25 L. ed. 554, Ingler, Cas. in Sales, 3.

25. Woodruff v. Graddy, 91 Ga. 333, 44 Am. St. 33; Gilbert v. Forest C. Co., 72 Ill. App. 186; Carter v. Cream Co., 73 Minn. 315; Ford v. Dyer, 148 Mo. 528; Herbert v. Winters, 15 Mont. 528; Empire Co. v. Moers (N. Y.), 27 App. Div. 464; Quinton v. Cutlip, 1 Okla. 302; Triplett v. Morris, 18 Tex. Civ. App. 50.

It is not essential that the subject-matter of an executory sale be in existence at the time the contract is entered into; it may relate to goods which the seller is to manufacture or subsequently to acquire,²⁶ such goods sometimes being designated as "future" goods. It is essential, however, that the subject-matter of an executed sale be in existence,²⁷ either actually or potentially,²⁸ as otherwise there is nothing to which ownership can attach,

It will be noticed that these terms have not the same meaning as when used to designate other contracts than contracts of sale; a contract ordinarily is not regarded as executed until fully performed by each party, but in a sale these terms relate to the transfer of ownership only, as that is the essence of the contract.

26. Logan v. Musick, 81 Ill. 415; Sawyer v. Taggart, 77 Ky. 727; Stanton v. Small, 3 Sandf. 230; Smith v. Bouvier, 70 Pa. St. 325; White v. Barber, 123 U. S. 392; Hibblewhite v. McMorine, 5 M. & W. 462.

27. 1 Mechem, Sales, 185, § 202; Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646. See Uniform Sales Act, § 5. The Latin maxim is, *Nemo dat quod non habet* (No one can give who does not possess). There cannot be a *present sale* of fish to be caught; Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357, Pattee, Illus. Cas. in Personalty, 205, Ingler, Cas. in Sales, 11; though there might be an *agreement to sell* fish which the seller intended to catch.

The importance of the distinctions between an executed and an executory sale is that in an executed sale the buyer owns the goods, a subsequent loss falling upon him, and he can maintain an action for possession or for conversion; whereas in an executory sale which is merely a promise to sell, the seller remains the owner and subsequent losses fall on him, and for failure of the buyer to perform the contract, the seller has an action for damages only. Zwissler v. Storta, 30 Mo. App. 163.

28. 1 Mechem, Sales, 183, § 200; Hurst v. Bell, 72 Ala. 336; Cutting Co. v. Packers' Exch., 86 Cal. 574, 21 Am. St. 63; Hull v. Hull, 48 Conn. 250, 40 Am. Rep. 165; Sanborn v. Benedict, 78 Ill. 309; Headrick v. Brattain, 63 Ind. 438; Emerson v. European Co., 67 Me. 387, 24 Am. Rep. 39; Heald v. Builders' Co., 111 Mass. 38; Dickey v. Waldo, 97 Mich. 255, 23 L. R. A. 449; Conderman v. Smith, 41 Barb. 404; Fonville v. Casey, 5 N. Car. 389, 4 Am. Dec. 559; Moore v. Byram, 10 S. Car. 452; McCarty v. Blevins, 13 Tenn. 195, 26 Am. Dec. 262; Smith v. Atkins, 18 Vt. 461; Senter v. Mitchell, 16 Fed. 206; Wood and Foster's Cas., Leon. 42. See, *ante*, § 110.

A present sale can be made of cheese to be manufactured from milk from cows now owned by the seller. Van Hoozer v. Cory, 34 Barb. 12.

or which can be transferred from the seller to the buyer;²⁹ nor can there be a sale of something which has ceased to exist,³⁰ the latter, in the law of contracts, being known as mistake as to the existence of the subject-matter.³¹

The tense of the verb in a written contract does not indicate necessarily whether a sale is executed or executory, but the question must be determined from the whole instrument.³² A statement that A. "sells" or "has sold" and that B. "buys" or "has bought" *prima facie* indicates an executed sale; but a contrary intention would be shown if other terms of the contract indicated that the subject-matter was yet to be acquired by the seller. Likewise, the expression, A. "will sell" or "agrees to sell" and B. "will buy" or "agrees to buy," at the beginning of a contract might be shown by the subsequent terms thereof, to be a present transfer of ownership.³³

An Express Sale is one in which all the terms have been passed upon and fixed definitely by the parties; an Implied Sale is one in which all of the terms have not been designated in words, but some are to be supplied by the conduct³⁴ of the parties. A former course of dealing

29. 1 Mechem, Sales, 181, § 199.

30. Young v. Bruces, 15 Ky. 324; Hamilton v. Park Co., 125 Mich. 72; Dexter v. Norton, 47 N. Y. 62; Harris v. Nicholas, 19 Va. (5 Munf.) 483; Hastie v. Coutourier, 9 Exch. 102, 5 H. L. Cas. 673; Uniform Sales Act, § 7 (1). If the parties went through the form of selling specific lumber which, unknown to them, had burned, there would not be any contract. This also might be put on the ground of impossibility, or of lack of mutual assent.

31. 1 Mechem, Sales, 254, § 271.

32. Kost v. Reilly, 62 Conn. 57; Lester v. East, 49 Ind. 588; Sherwin v. Mudge, 127 Mass. 547, Ingler, Cas. in Sales, 5; Brock v. O'Donnell, 45 N. J. L. 441; Decker v. Furniss, 14 N. Y. 615.

33. Martin v. Adams, 104 Mass. 262; Bangs v. Friezen, 36 Minn. 423.

34. Where supplies for a railroad, according to a known usage, are placed beside the track for inspection, this amounts to an offer to sell; and their subsequent appropriation by the company amounts to acceptance, without any words being spoken or written. Kinney v. Railroad Co., 82 Ala. 368.

between two persons may govern their future deals; and where the parties fail to designate the price, the law implies from the facts that they intend a reasonable price.

An Absolute Sale is one in which the contract is free from conditions; while a Conditional Sale,³⁵ as the word indicates, is one in which there are conditions to be performed by one or by both of the parties. The conditions may be precedent, concurrent or subsequent. A condition precedent³⁶ must be performed before the ownership

35. A conditional sale is distinguished from a pledge because the creditor is not in possession.

36. A common condition precedent is that the price shall be paid. *Dudley v. Abner*, 52 Ala. 572; *Carroll v. Wiggins*, 30 Ark. 402; *Putnam v. Lamphier*, 36 Cal. 151; *Hine v. Roberts*, 48 Conn. 267; *Jowers v. Blandy*, 58 Ga. 379; *Van Duzor v. Allen*, 90 Ill. 499; *Forrest v. Hamilton*, 98 Ind. 91; *Moseley v. Shattuck*, 43 Iowa, 540; *Fleck v. Warner*, 25 Kans. 492; *Vaughn v. Hopson*, 73 Ky. 337; *Rogers v. Whitehouse*, 71 Me. 222; *Walsh v. Taylor*, 39 Md. 592; *Salomon v. Hathaway*, 126 Mass. 482; *Fifield v. Elmer*, 25 Mich. 48; *McClelland v. Nichols*, 24 Minn. 176; *Ketchum v. Brennan*, 53 Miss. 596; *Wrangler v. Franklin*, 70 Mo. 659; *Aultman v. Mallory*, 5 Nebr. 178; *Cardinal v. Edwards*, 5 Nev. 36; *Holt v. Holt*, 59 N. H. 276; *Cole v. Berry*, 42 N. J. L. 308; *Boon v. Moss*, 70 N. Y. 465; *Vasser v. Buxton*, 86 N. Car. 335; *Sanders v. Keber*, 28 Ohio St. 630; *Hartley v. Decker*, 89 Pa. St. 470; *Goodell v. Fairbrother*, 12 R. I. 233; *Talmadge v. Oliver*, 14 S. Car. 522; *Price v. Jones*, 40 Tenn. 84; *Christian v. Bunker*, 38 Tex. 234; *Burrell v. Marvin*, 44 Vt. 277; *Leavell v. Robinson*, 29 Va. (2 Leigh) 161; *Hunter v. Werner*, 1 Wis. 141; *Fosdick v. Shall*, 99 U. S. 250. When the price is paid, the condition is extinguished. *Hunter v. Crook* (Miss.), 47 So. 430.

An obligation to give notice may be implied; *Henkle v. Smith*, 21 Ill. 238; *Cullum v. Wagstaff*, 48 Pa. St. 300; *Empire Co. v. Heller*, 61 Fed. 280, 9 C. C. A. 504, 20 U. S. App. 589; as where the seller is to manufacture the goods and the buyer is to send for them. *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Lockhart v. Bonsall*, 77 Pa. St. 53.

Another condition precedent is that the goods are to be satisfactory to the buyer. 1 *Mechem, Sales*, 545, § 663; *Worthington v. Gwin*, 119 Ala. 44. 55; *Hallidie v. Sutter Co.*, 63 Cal. 575 (steel cable); *Zaleski v. Clark*, 44 Conn. 218 (bust); *Goodrich v. Van Nortwick* (1867), 43 Ill. 445 (fanning-mill); *Inman Co. v. American Co.*, 124 Iowa, 737 (machine); *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463 (suit of clothes); *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351 (portrait);

in the subject-matter can pass to the buyer; concurrent³⁷ conditions are to be performed by the parties at the same time; while upon the non-performance of a condition subsequent, the ownership which already has passed to the buyer, will be divested.³⁸ A Contingent Sale is one in which the passing of the absolute ownership to the buyer depends upon the happening or not happening of some uncertain event.³⁹

McCormick Co. v. Chesrown, 33 Minn. 32 (machinery); *Gray v. Central Co.*, 11 Hun, 70 (steamboat); *Garland v. Keeler*, 15 N. Dak. 548 (machine); *Singerly v. Thayer*, 103 Pa. St. 291, 56 Am. Rep. 207 (elevator); *Pennington v. Howland*, 21 R. I. 65; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557 (organ); *Tatum v. Geist*, 46 Wash. 226 (machine); *Warder Co. v. Whitish*, 77 Wis. 430; *Re Geo. M. Hill Co.*, 123 Fed. 866, 59 C. C. A. 254 (machine); *Andrews v. Belfield*, 2 C. B. N. S. 779.

37. Delivery of the goods by the seller and payment of the price by the buyer are concurrent conditions. Uniform Sales Act, § 42.

Where the price is not paid as expected, the right of the seller to reclaim the goods will be lost if not exercised promptly; *H. K. Porter Co. v. Boyd*, 171 Fed. 305; as delivery of the goods without requiring payment of the price, is presumptive evidence of the waiver of the condition that payment must be made before title vests in the buyer. *Mixer v. Clark*, 31 Me. 340; *Haskins v. Warren*, 115 Mass. 514; *Hammett v. Linneman*, 48 N. Y. 399; *Bowen v. Burk*, 13 Pa. St. 146.

38. 1 Mechem, Sales, 464, § 561, ¶ 4. A buyer cannot be compelled to perform a condition subsequent if its performance has become unlawful. Thus where a slave was purchased on condition that the buyer subsequently should emancipate it, and an act was passed forbidding emancipation, performance becomes impossible. *Julienne v. Touriac*, 64 La. (13 La. Ann.) 599.

At common law, a mortgage was simply a sale on condition subsequent.

39. Where goods are consigned by a manufacturer to an agent under an agreement that he is to be considered a buyer if and when he sells to a customer, such sales to the agent would be contingent upon a customer appearing. *Aetna Co. v. Hildebrand*, 137 Ind. 462; *Nutter v. Wheeler*, 2 Lowell, 346; *Ex parte White*, L. R. 6 Ch. 397.

A contract for the sale of goods to arrive by a designated vessel is subject to a double contingency precedent, first, that the vessel shall arrive, and, second, that the goods shall be on board. *Neldon v. Smith*, 36 N. J. L. 148; *Shields v. Pettie*, 4 N. Y. 122, 2 Sandf. 262; *Lovatt v. Hamilton*, 5 M. & W. 639. See, also, *Lillenthal v. Suffolk Co.*, 154 Mass. 185, 26 Am. St. 234, 13 L. R. A. 821, where the contingency related to the price.

If a person is given an option to purchase property, called a "sale on approval"⁴⁰ or "on trial," the option is enforceable if there be a consideration for it; but, in such cases, the ownership remains in the seller¹ until steps are taken to exercise the option,² unless the goods are retained by the buyer for such a length of time as to imply approval.³ These cases are to be distinguished from what is designated as a "sale or return," which is a present sale transferring the ownership to the buyer but giving him the option to return the goods within a designated time,⁴ or within a reasonable time⁵ if a time has

Sometimes the law annexes a contingency. *Benedict v. Field*, 4 Duer, 154, 16 N. Y. 595; *Stockdale v. Dunlop*, 6 M. & W. 224. Where a contract was made to sell 200 tons of potatoes from designated land which ordinarily produced that amount, but which, owing to a blight, produced but 80 tons, which were delivered, the seller would not be liable for not delivering 200 tons. *Howell v. Coupland*, L. R. 9 Q. B. 462, 1 Q. B. D. 258.

The same rules govern conditional and contingent sales; and contingent sales generally are called conditional ones.

40. 1 Mechem, Sales, 542, § 657.

1. *Prairie Co. v. Taylor*, 69 Ill. 440; *Mowbray v. Cady*, 40 Iowa, 604; *Spickler v. Marsh*, 36 Md. 222; *Hunt v. Wyman*, 100 Mass. 198, *Pattee*, Illus. Cas. in Personalty, 323; *Hickman v. Shimp*, 109 Pa. St. 16; *Waters Co. v. Mansfield*, 48 Vt. 378; *Kahn v. Klabunde*, 50 Wis. 235. Thus if the subject of the sale is a horse, which dies before approval, the loss falls upon the seller. *Elphick v. Barnes*, 5 C. P. D. 321.

2. 1 Mechem, Sales, 542, § 658; *Pitt's Co. v. Poor*, 7 Ill. App. 24; *Davis Co. v. McHugh*, 115 Iowa, 415; *Pierce v. Cooley*, 56 Mich. 552; *Whitehead v. Vanderbilt*, 10 Daly, 214; *Glasscock v. Hazell*, 109 N. Car. 145; *Hall Co. v. Brown*, 82 Tex. 469; *Re Geo. M. Hill Co.*, 123 Fed. 866, 59 C. C. A. 354; *Swain v. Shepherd*, 1 M. & Rob. 223.

3. *Forsaith Co. v. Mengel*, 99 Mich. 280; *Cook v. Gross* (N. Y.), 60 App. Div. 446; *Dewey v. Erie*, 14 Pa. St. 211, 53 Am. Dec. 533; *Washington v. Johnson*, 26 Tenn. 468; *Moss v. Sweet*, 16 Q. B. 493, 20 L. J. Q. B. 167, 3 Eng. L. & Eq. 311.

4. *Stevens v. Hertzler*, 109 Ala. 423; *Hotchkiss v. Higgins*, 52 Conn. 205; *Jones v. Wright*, 71 Ill. 61; *Jameson v. Gregory*, 61 Ky. 863; *Ray v. Thompson*, 66 Mass. 287, 59 Am. Dec. 187; *Quinn v. Stout*, 31 Mo. 160; *Moore v. Piercy*, 46 N. Car. 131; *Schlesinger v. Stratton*, 9 R. I. 578; *Beverly v. Lincoln Co.*, 6 A. & E. 828.

5. 1 Mechem, Sales, 562, § 681; *House v. Beak*, 141 Ill. 290, 33 Am. St. 307; *Gale Co. v. Moore*, 46 Kans. 324; *Childs v. O'Donnell*, 84

not been fixed,⁶ his ownership being defeasible by an exercise of his option to return.⁷

A Public Sale is one made at auction to the highest bidder; a Private Sale is one made as the result of negotiations between the parties which are not public. A Voluntary Sale is one made without compulsion, or by authority of the owner; all private sales are voluntary,⁸ and a public sale may be voluntary. A Forced Sale⁹ is one made pursuant to law, generally without the consent of the owner, and publicly.

§ 157. Sales—Statute of Frauds—Enactment. At common law a contract of sale does not require any formalities; and, in the absence of a statute on the point, an oral contract is as enforceable as one in writing;¹⁰ but, "for prevention of Frauds and Perjuries," the English Parliament passed an act known as the Statute of Frauds (29 Car. II, chap. 3) which became effective in

Mich. 533; *Columbia Co. v. Beckett*, 55 N. J. L. 391; *Luger Co. v. Street*, 6 Okla. 312.

6. 1 Mechem, Sales, 562, § 682.

7. *Foley v. Felrath*, 98 Ala. 180; *Colton v. Wise*, 7 Ill. App. 397; *Wind v. Iler*, 93 Iowa, 316.

A sale on approval involves a condition or contingency precedent, while a sale or return is an illustration of a condition or contingency subsequent, each being conditional as to the party having the right to exercise the option, and contingent as to the other.

8. 1 Mechem, Sales, 11, § 10.

9. A forced sale usually receives a designation from the capacity in which the person conducting it is acting, as a "sheriff's sale," an "executor's sale," etc. 1 Mechem, Sales, 10, § 8. When made by a sheriff under an execution, a sale is called an "execution sale;" if made by a court in a pending suit, it is called a "judicial sale." A judicial sale is made through the agency of an officer of the court; 1 Mechem, Sales, 10, § 9; *Hutton v. Williams*, 35 Ala. 503; *Halleck v. Guy*, 9 Cal. 181; *Bozza v. Rowe*, 30 Ill. 198; *Ketchum v. Schieketzanz*, 73 Ind. 137; *Sturdevant v. Norris*, 30 Iowa, 65; *Hurt v. Stull*, 4 Md. Ch. 393; *Diesback v. Stein*, 41 Ohio St. 70; *Armor v. Cochrane*, 66 Pa. St. 308; *Williamson v. Berry*, 49 U. S. 547; such as a master in chancery, and is not a judicial one.

10. 1 Mechem, Sales, 267, § 281. A written contract merely affords better evidence of the exact agreement.

the year 1677, the seventeenth section of the act providing that from and after the "fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some Note or Memorandum in writeing of the said bargain be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized."¹¹ This statute has been reenacted in substance in each of the United States, with the exception of Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia.¹² As there is considerable variation¹³ in the wording of the statutes of these states, the student should consult the statute of his own particular state to ascertain what contracts are required to be evidenced in writing. Lord Tenterden's Act (9 George IV, chap. 14, §7 enacted May 9, 1828) provided that executory as well as executed sales were governed by the Statute of Frauds;¹⁴ though Lord Tenterden's Act was declaratory merely,¹⁵ and did not change the former statute.

§ 158. Sales—Statute of Frauds—Contracts Within. A contract is said to be within the Statute of Frauds

11. Browne, *Stat. of Frauds* (5th ed.), 648.

12. See 1 Mechem, *Sales*, 271, § 290.

13. An effort is being made to have all of the states adopt an act "to make uniform the law relating to the sale of goods." This Sales Act already has been adopted by several of the states. Section four thereof relates to the requirements of an enforceable sale; but the language of this section is not the same in all of the states which have adopted the Uniform Sales Act.

14. 1 Mechem, *Sales*, 268, § 283; 272, § 293.

15. *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229. The object of declaratory statute usually is to remove possible doubts, and does not change existing law.

when it is one which would not be enforceable unless complying with its requirements. In applying the statute of frauds a distinction must be made between contracts of sale and contracts for work and labor, the latter not being within the statute. In most of the states if the contract is to sell an article which the seller usually has for sale in the course of his business, the statute applies although the seller is to manufacture the article for the buyer;¹⁶ in some states,¹⁷ goods to be manufactured are not within the statute; while in a few jurisdictions contracts to manufacture an article for a person ordering it, whether kept by the seller for sale in the course of his business or not, are treated as sales, and within the statute.¹⁸ A stipulation made in a contract of sale that the seller may repurchase is not an independent contract; hence if the statute of frauds is satisfied so far as the original contract was concerned, the agreement to repurchase is enforceable.¹⁹

§ 159. Sales—Statute of Frauds—"Goods, Wares and Merchandises." The question as to what constitutes "goods, wares, and merchandises," has been quite troublesome. Generally *fructus industriales*, whether ma-

16. *Flynn v. Dougherty*, 91 Cal. 669, 14 L. R. A. 230; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Cason v. Cheely*, 6 Ga. 554; *Yoe v. Newcomb*, 33 Ind. App. 615; *Crockett v. Scribner*, 64 Me. 447; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112, *Griffin, Illus. Cas. on Pers. Prop.* 95; *Turner v. Mason*, 65 Mich. 662; *Brown Co. v. Wunder*, 64 Minn. 450, 32 L. R. A. 593; *O'Neill v. Mining Co.*, 3 Nev. 141; *Finney v. Apgar*, 31 N. J. L. 271; *Orman v. Hager*, 3 N. Mex. 331; *Forsyth v. Mann*, 68 Vt. 116, 32 L. R. A. 788; *Puget Depot v. Rigby*, 13 Wash. 264; *Meincke v. Falk*, 55 Wis. 427, 42 Am. Rep. 722; *Williams-Haywood Co. v. Brooks*, 9 Wyo. 424. See Uniform Sales Act, § 4 (2).

17. *Bennett v. Nye*, 4 Greene, 410; *Bagby v. Walker*, 78 Md. 239; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, *Griffin, Illus. Cas. on Pers. Prop.* 87; *Suber v. Pullin*, 1 S. Car. 273.

18. *Canada Co. v. Toronto Co.*, 22 Ont. App. 462; *Lee v. Griffin*, 1 B. & S. 272, 30 L. J. Q. B. 252, *Griffin, Illus. Cas. on Pers. Prop.* 85.

19. *Johnston v. Trask*, 116 N. Y. 136, 15 Am. St. 394, 5 L. R. A. 630; *Fay v. Wheeler*, 44 Vt. 292; *Williams v. Burgess*, 10 A. & E. 499.

tured or not, are held to come within this designation.²⁰ In most states, a sale of standing trees is a sale of an interest in land;²¹ but in some states a contract for a sale of trees which are not to derive any benefit from the soil but are to be removed immediately, is not a contract for an interest in land.²² A contract for the sale of a house affixed to the realty, is treated as a sale of goods if the parties have in mind the house severed and moved from its foundation.²³

Choses in action, even though evidenced by a document, are held not to come within the statute in some states; in other states, securities having a visible and

20. 1 Mechem, Sales, 311, § 342; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Bull v. Griswold*, 19 Ill. 631; *Sherry v. Picken*, 10 Ind. 375; *Moreland v. Myall*, 77 Ky. 474; *Bryant v. Crosby*, 40 Me. 9; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Ross v. Welch*, 77 Mass. 235; *Swafford v. Spratt*, 93 Mo. App. 631; *Webster v. Zielly*, 52 Barb. 482; *Walton v. Jordan*, 65 N. Car. 170; *Carson v. Browder*, 70 Tenn. 701; *Kerr v. Hill*, 27 W. Va. 576; *Watts v. Friend*, 10 B. & C. 446.

21. 1 Mechem, Sales, 306, § 336; *McRae v. Stillwell*, 111 Ga. 65; *Osborn v. Rabe*, 67 Ill. 108; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Miller v. Stevens*, 100 Mass. 518, 1 Am. Rep. 139, 97 Am. Dec. 123; *Kirkeby v. Erickson*, 90 Minn. 299, 101 Am. St. 411; *Walton v. Lowrey*, 74 Miss. 484; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Thomson v. Poor* (N. Y.), 57 Hun, 288, 67 Hun, 653; *Drake v. Howell*, 133 N. Car. 162; *Hirth v. Graham*, 50 Ohio St. 57, 40 Am. St. 641, 19 L. R. A. 721; *Pattison's App.*, 61 Pa. St. 294, 100 Am. Dec. 637; *Knox v. Haralson*, 2 Tenn. Ch. 232; *Buck v. Pickwell*, 27 Vt. 157; *Stuart v. Pennis*, 91 Va. 688; *Fluharty v. Mills*, 49 W. Va. 446; *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. 957; *Summers v. Cook*, 28 Grant Ch. 179; *Waddington v. Bristow*, 2 B. & P. 452.

22. *Bostwick v. Leach*, 3 Day, 476; *Byassee v. Reese*, 61 Ky. 372, 83 Am. Dec. 481; *Ersline v. Plummer*, 7 Me. 447, 22 Am. Dec. 216; *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Claffia v. Carpenter*, 45 Mass. 580, 38 Am. Dec. 381; *Brown v. Stanclift*, 80 N. Y. 627; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306; *Marshall v. Green*, 1 C. P. D. 35, 45 L. J. C. P. 153.

23. *Harris v. Powers*, 57 Ala. 139; *Long v. White*, 42 Ohio St. 59; *Scales v. Wiley*, 68 Vt. 39. See, also, *Michael v. Curtis*, 60 Conn. 363.

tangible form and which are the subject of common sale, are within the statute; while in other jurisdictions choses in action not evidenced by a writing are held to be within the statute.²⁴ In some statutes choses in action are mentioned expressly, while others substitute for "goods, wares and merchandises," the broad term "personal property," which includes choses in action.²⁵

§ 160. **Sales—Statute of Frauds—Effect.** Generally an agreement within the statute but not complying therewith, is held to be a valid but unenforceable contract and not a void agreement.²⁶ The distinction is important because a void agreement is not a contract at all, being treated in law as if it never had any existence, and any action taken under it could be rescinded; while an unenforceable contract is perfectly valid and effective unless one of the parties chooses to avail himself of the defense given by the statute before the contract has been per-

24. 1 Mechem, Sales, 302, § 330. The statute does not include choses in action; *Colonial B'k v. Whinney*, 30 Ch. D. 283; being restricted to corporeal movable property. *Webb v. Baltimore Co.*, 77 Md. 92, 39 Am. St. 396. The statute extends to "securities which are subjects of common sale and barter and which have a visible and tangible form." *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459. The statute includes corporate stock. *Mayer v. Child*, 47 Cal. 142, 144; *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Tisdale v. Harris*, 37 Mass. 9, *Griffin, Illus. Cas. on Pers. Prop.* 98; *Bernhardt v. Walls*, 29 Mo. App. 206. The statute does not include corporate stock. *Humble v. Mitchell*, 11 A. & E. 205, *Griffin, Illus. Cas. on Pers. Prop.* 97. The statute includes promissory notes. *Baldwin v. Williams*, 44 Mass. 365. The statute does not include promissory notes. *Hudson v. Weir*, 29 Ala. 294; *Vawter v. Griffin*, 40 Ind. 293; *Whittemore v. Gibbs*, 24 N. H. 484. Simple contract debts are included in the statute. *Walker v. Supple*, 54 Ga. 179; *French v. Schoonmaker*, 69 N. J. L. 6 (accounts).

25. 1 Mechem, Sales, 270, § 287. Personal property. *Mayer v. Child*, 47 Cal. 142; *Southern Co. v. Cole*, 4 Fla. 359. Chattels or things in action. *Tompkins v. Sheehan*, 158 N. Y. 617; *Spear v. Bach*, 82 Wis. 102. Choses in action. *Uniform Sales Act*, § 4 (1).

26. *Jackson v. Stanfield*, 137 Ind. 592, 621; *Bird v. Munroe*, 66 Me. 337; *Wainer v. Insurance Co.*, 153 Mass. 335; *Crane v. Powell*, 139 N. Y. 379; *Maddison v. Alderson (Eng.)*, 8 App. Cas. 488.

formed,²⁷ and third persons cannot take advantage of the defense.²⁸ An unenforceable contract may be the basis and consideration of another contract which will be enforced.

§ 161. Sales—Statute of Frauds—Oral Contracts. There are four instances under the statute where an oral contract of sale is enforceable. First, where the price is under the amount specified in the statute; second, where there is acceptance and receipt of a part of the goods; third, where something is given in earnest or part payment; and, fourth, where a written memorandum is made and signed by the party to be charged.²⁹

§ 162. Sales—Statute of Frauds—Price. In most states the amount fixed by the statute, above which it applies, is fifty dollars, approximating the amount of ten pounds named in the English statute. The amounts fixed in other states range from thirty to two thousand, five hundred dollars.³⁰ If the total value of all the goods bar-

27. *Norton v. Simonds*, 124 Mass. 19; *Sullivan v. Sullivan*, 70 Mich. 583; *Brown v. Loan Co.*, 117 N. Y. 266; *Bibb v. Allen*, 149 U. S. 481.

28. The defense afforded by the statute is a personal privilege, available only to the parties to the contract or to their privies. *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588; *Cowan v. Adams*, 10 Me. 374, 25 Am. Dec. 242; *Ames v. Jackson*, 115 Mass. 508; *Rickards v. Cunningham*, 10 Neb. 417; *Sherron v. Humphreys*, 14 N. J. L. 217; *Browning v. Parker*, 17 R. I. 183; *Briggs v. United States*, 143 U. S. 346, 36 L. ed. 180. Thus, an insurance company cannot assert that the buyer does not have any insurable interest in the property; *Wainer v. Milford Co.*, 153 Mass. 335, 11 L. R. A. 598; *Amsinck v. American Co.*, 129 Mass. 185; and the buyer can maintain replevin against a third person. *Norton v. Simonds*, 124 Mass. 19.

29. See Uniform Sales Act, § 4 (1).

30. See 1 Mechem, Sales, 271, § 289. In Florida a limit is not named. In Ohio, the limit is \$2,500. Laws of 1908, p. 413. The value prescribed in the Uniform Sales Act, § 4 (1), is \$500; but some of the states adopting this act have raised, and some have lowered this amount. When the amount was fixed by the original English statute, ten pounds represented a greater value than it does to-day.

gained for in one contract exceeds the value named in the statute, the statute applies although a separate price, less than the statutory amount, may be agreed upon for each article.³¹

§ 163. Sales—Statute of Frauds—Acceptance and Receipt. Acceptance and receipt are two separate and distinct requirements,³² as there may be one without the other.³³ Acceptance is assent on the part of the buyer to take the goods as owner, which cannot occur until the goods are identified³⁴ and after delivery by the seller,³⁵ and it may be subsequent to the bargain.³⁶ Acceptance may be constructive, as would be the case if the buyer deals with the goods as the owner thereof³⁷ by resell-

31. 1 Mechem, Sales, 315, § 349; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210; *Allard v. Greasert*, 61 N. Y. 1, *Griffin, Illus. Cas. on Pers. Prop.* 103; *Coffman v. Hampton*, 2 Watts & S. 377, 37 Am. Dec. 511; *Baldehy v. Parker*, 2 B. & C. 37.

If the goods are to be delivered in installments, the contract is within the statute if the total value exceeds the statutory limit, even though the value of each installment is less than such limit. *Marsh v. Hyde*, 69 Mass. 331; *Standard Co. v. Towns*, 72 N. H. 324.

32. *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Powder Co. v. Lamb*, 38 Neb. 339; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619, *Griffin, Illus. Cas. on Pers. Prop.* 87; *Baldy v. Parker*, 2 B. & C. 37.

33. 1 Mechem, Sales, 319, § 354.

34. *Terney v. Doten*, 70 Cal. 399; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47; *Rodgers v. Phillips*, 40 N. Y. 519.

35. 1 Mechem, Sales, 319, § 354.

36. 1 Mechem, Sales, 323, § 362; *Buckingham v. Osborne*, 44 Conn. 133; *Coffin v. Bradbury*, 3 Idaho, 770, 95 Am. St. 37; *Bush v. Holmes*, 53 Me. 417; *Marsh v. Hyde*, 69 Mass. 331; *Orloff v. Klitzke*, 43 Minn. 154; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210; *Field v. Runk*, 22 N. J. L. 525; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Danforth v. Walker*, 40 Vt. 257; *Amson v. Dreher*, 35 Wis. 615.

37. 1 Mechem, Sales, 322, § 360; *Barkalow v. Pfeiffer*, 38 Ind. 214; *Leggett v. Collier*, 89 Iowa, 144; *Edwards v. Brown*, 98 Me. 165; *Leonard v. Medford*, 85 Md. 666, 37 L. R. A. 449; *Meehan v. Sharp*, 151 Mass. 564; *Sullivan v. Sullivan*, 70 Mich. 583; *Taylor v. Mueller*, 30 Minn. 343, 44 Am. Rep. 199; *Roman v. Bressler*, 49 Neb. 368; *Gray v. Davis*, 10 N. Y. 285; *Galvin v. MacKenzie*, 21 Ore. 184;

ing,³⁸ by mortgaging,³⁹ or by keeping them for an unreasonable length of time.⁴⁰

Receipt may occur any time before⁴¹ or after acceptance;⁴² and may be constructive.⁴³ If the goods are in the possession of a third person, consent of such person to hold as bailee for the buyer and the buyer's assent to the bailment or, as it sometimes is expressed, attornment by the bailee to the buyer is sufficient.⁴⁴ If the goods were in the possession of the buyer at the time of the bargain he will be deemed to have received them.⁴⁵

Becker v. Holm, 89 Wis. 86; *Hinchman v. Lincoln*, 124 U. S. 38, 31 L. ed. 337; *Chaplin v. Rogers*, 1 East, 192. See, *post*, § 182.

Acceptance by the buyer may be shown by his using the goods; *Beaumont v. Brengerie*, 5 C. B. 301; by having silverware engraved with his name; *Walker v. Boulton*, 3 U. C. Q. B. O. S. 252; or by changing the character of the goods purchased. *Parker v. Wallis*, 5 E. & B. 21. In the latter case, Earle, J., said: "If the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them."

38. *Marshall v. Ferguson*, 23 Cal. 65; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Hill v. McDonald*, 17 Wis. 97; *Robinson v. Gordon*, 23 U. C. Q. B. 143; *Morton v. Tibbett*, 15 Q. B. 428.

39. *Wyer v. Rothschild*, 53 Neb. 566, 74 N. W. 41.

40. *Treadwell v. Reynolds*, 39 Conn. 31; *Hobbs v. Whip Co.*, 158 Mass. 194; *Godkin v. Weber* (Mich.), 114 N. W. 924; *Gaff v. Homeyer*, 59 Mo. 345; *Standard Co. v. Towns*, 72 N. H. 324; *Chambers v. Lancaster*, 160 N. Y. 342; *Lamar v. Richmond Inst.*, 8 Utah, 305; *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Coleman v. Gibson*, M. & Rob. 168. See, also, *Schwartz v. Church of H. C.*, 60 Minn. 183.

Dealing with a bill of lading representing the goods, may constitute acceptance. *Meredith v. Meigh*, 22 L. J. Q. B. 401, 2 E. & B. 364.

41. *Hewes v. Jordan*, 39 Md. 484; *Cross v. O'Donnell*, 44 N. Y. 211; 2 Lowell, 563; *Saunders v. Topp*, 4 Exch. 390.

42. 1 Mechem, Sales, 331, § 375.

43. 1 Mechem, Sales, 332, § 378.

44. 1 Mechem, Sales, 340, § 387; *Daniel v. Hannah*, 106 Ga. 91; *Townsend v. Hargraves*, 118 Mass. 325; *Wing v. Peabody*, 57 Vt. 19; *Bentall v. Burn*, 3 B. & C. 423. See, also, *St. Paul Co. v. Howell*, 59 Minn. 295.

45. *Devine v. Warner*, 75 Conn. 375, 96 Am. St. 211, 76 Conn. 229; *Lillywhite v. Devereux*, 15 M. & W. 285. See, however *Follett*

As the statute is satisfied by the acceptance and receipt of a part of the goods,⁴⁶ it is immaterial how small that part is⁴⁷ if it diminishes the quantity, unless it is a mere sample for the purpose of showing what the goods are like. However, it is essential that whatever is accepted and received be taken as a part; if the buyer takes part with an express repudiation as to the remainder, the statute is not satisfied.¹

§ 164. **Sales—Statute of Frauds—Part Payment.** In former times payment of a small sum was made which was not regarded as a part of the price, being given to bind the bargain and designated as “earnest,” which was sufficient under the statute; but in modern times earnest, in this sense, is not given, having become synonymous with part payment² so that the subject of earnest is not now of any importance.³ The part payment required by the statute may be made at any time⁴ before action is brought,⁵ and may be in property⁶ or by the

Co. v. Deposit Co. (N. Y.), 84 App. Div. 151. It is not necessary for the parties to perform the idle ceremony of returning the property to the seller in order that the buyer may take formal receipt thereof again. 1 Mechem, Sales, 342, § 389.

46. 1 Mechem, Sales, 346, § 398.

47. 1 Mechem, Sales, 346, § 399; *Garfield v. Paris*, 96 U. S. 557.

1. 1 Mechem, Sales, 348, § 403; *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47.

2. 1 Mechem, Sales, 349, § 404; *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306.

3. In *Bach v. Owen*, 5 T. R. 409, a halfpenny was held sufficient to transfer the property in a horse.

4. *Davis v. Moore*, 13 Me. 424; *Dallavo v. Richardson*, 134 Mich. 226; *Gault v. Brown*, 48 N. H. 183, 2 Am. Rep. 210.

5. 1 Mechem, Sales, 353, § 420; *Marsh v. Hyde*, 69 Mass. 331.

Some states, as in California, Colorado, Idaho, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oregon, Utah, Wisconsin, and Wyoming, require the part payment to be made “at the time” of the contract. 1 Mechem, Sales, 352, § 419; *Hunter v. Wetsel*, 57 N. Y. 375, 15 Am. Rep. 508, 84 N. Y. 549, 38 Am. Rep. 544; *Crosby Co. v. Trester*, 90 Wis. 412.

6. *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Howe v. Jones*, 57 Iowa, 130; *Eastern Co. v. Benedict*, 76 Mass. 212; *Burton*

use⁷ of property, or in services,⁸ or by the note of a third person taken as absolute payment;⁹ but an unaccepted tender of money is not sufficient.¹⁰ Payment may be made by the buyer to a third person if in accordance with an agreement with the seller.¹¹

§ 165. **Sales—Statute of Frauds—Memorandum.** The “note or memorandum” required by the statute may be made at any time before action is brought on the contract¹² or even before the bargain is complete, as in the case of a written offer;¹³ formality is not required.¹⁴ The note or memorandum may consist of account-

v. Gage, 85 Minn. 355; Dow v. Worthen, 37 Vt. 108; Sharp v. Carroll, 66 Wis. 62.

7. In Weir v. Hudnut, 115 Ind. 525, the use of sacks delivered by the buyer to the seller to transport corn—the subject-matter of the sale, was to be deducted from the price; and, hence, became part-payment.

8. In Driggs v. Bush, 152 Mich. 53, the buyer hired men to bale hay—the subject-matter of the sale, such baling being a part of the agreement with the seller. White v. Drew, 56 How. Pr. 53.

9. 1 Mechem, Sales, 351, § 414; Combs v. Bateman, 10 Barb. 573.

10. Hershey Co. v. St. Paul Co., 66 Minn. 449; Edgerton v. Hodge, 41 Vt. 676. See, also, Bowers v. Anderson, 49 Ga. 145.

11. 1 Mechem, Sales, 352, § 417; Brady v. Harrahy, 21 U. C. Q. B. 340. See, also, Stoddard v. Graham, 23 How. Pr. 518. Part payment may be made to the agent of the seller; Burnhans v. Corey, 17 Mich. 282; Case v. Kramer, 34 Mont. 142; provided the authority is not conferred by the oral agreement of sale which is sought to be enforced. Hawley v. Keeler, 53 N. Y. 114; 1 Mechem, Sales, 353, § 421.

12. 1 Mechem, Sales, 354, § 424; Bill v. Bament, 9 M. & W. 36.

13. Lydig v. Braman, 177 Mass. 212; Austrian v. Springer, 94 Mich. 343, 34 Am. St. 350; Kessler v. Smith, 42 Minn. 494; Lash v. Parlin, 78 Mo. 391; Mason v. Decker, 72 N. Y. 595, 23 Am. Rep. 190; Bailey v. Leishman (Utah), 89 Pac. 78; Hawkinson v. Harmon, 69 Wis. 551; Egerton v. Mathews, 6 East, 307.

Contra: Cable Co. v. Hancock, 2 Ga. App. 73; American Co. v. Porter, 94 Iowa, 117.

14. 1 Mechem, Sales, 355, § 425. The memorandum may be written in pencil. Merritt v. Clason, 12 Johns. 103, 7 Am. Dec. 236; Draper v. Pattina, 2 Speers, 292.

books,¹⁵ of a statement of account,¹⁶ of a note, or of a telegram. However, it should contain all of the terms of the bargain¹⁷ not implied by law¹⁸ including the names or descriptions of the parties,¹⁹ the price,²⁰ the terms of

15. *Tufts v. Plymouth Co.*, 96 Mass. 407; *Peabody v. Soyars*, 56 N. Y. 230; *Sarl v. Bourdillion*, 1 C. B. N. S. 188.

16. *Linton v. Williams*, 25 Ga. 391; *Drury v. Young*, 58 Md. 546.

17. 1 *Mechem, Sales*, 360, § 433.

18. *Kriete v. Myer*, 61 Md. 558; *Oakman v. Rogers*, 120 Mass. 214; *Smith v. Shell*, 82 Mo. 215; *Brandon Co. v. Morse*, 48 Vt. 322.

19. 1 *Mechem, Sales*, 260, § 434; *Knox v. King*, 36 Ala. 367; *O'Sullivan v. Overton*, 56 Conn. 102, 105; *Ross v. Allen*, 45 Kan. 231, 10 L. R. A. 835; *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110; *McGovern v. Hern*, 153 Mass. 308, 25 Am. St. 632, 10 L. R. A. 815; *Clampet v. Bells*, 39 Minn. 272; *Sabre v. Smith*, 62 N. H. 663; *Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. 514, 11 L. R. A. 97; *Mayer v. Adrian*, 77 N. Car. 83; *Anderson v. Harold*, 10 Ohio, 399; *Grafton v. Cummings*, 99 U. S. 103, 25 L. ed. 366; *Klinitz v. Surry*, 5 Esp. 267. The memorandum must show which is the seller and which is the buyer. *Oglesby Co. v. Manufacturing Co.*, 112 Ga. 359; *Frank v. Eltringham*, 65 Miss. 281; *Vandenbergh v. Spooner*, L. R. 1 Exch. 316, 35 L. J. Exch. 201. Thus, "Sold Huguet, for J. Ogden & Co.," does not show whether the sale was by Huguet for J. Ogden & Co. as buyers, or to Huguet for J. Ogden & Co. as sellers. *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 509. In this case Ogden & Co. claimed to be the buyers. 1 *Mechem, Sales*, 361, § 434.

If the names are fictitious, oral evidence is admissible to identify the parties. *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. 486; *Tobin v. Larkin*, 183 Mass. 389; *Briggs v. Munchon*, 56 Mo. 467; *Dykens v. Townsend*, 24 N. Y. 57; *Brodhead v. Reinbald*, 200 Pa. St. 618, 86 Am. St. 735; *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819; *Trueman v. Loder*, 11 A. & E. 589.

20. 1 *Mechem, Sales*, 364, § 438; *Adams v. McMillan*, 7 Port. 73; *Sage v. Wilcox*, 6 Conn. 81; *Turner v. Lorillard Co.*, 100 Ga. 645, 62 Am. St. 345; *Levy v. Merrill*, 4 Me. 180; *Ashcroft v. Butterworth*, 136 Mass. 511; *James v. Muir*, 33 Mich. 223; *Hanson v. Marsh*, 40 Minn. 1; *Phelps v. Stillings*, 60 N. H. 505; *Stone v. Browning*, 68 N. Y. 598; *Hall v. Misenheimer*, 137 N. Car. 183, 107 Am. St. 474; *Soles v. Hickman*, 20 Pa. St. 180; *Kinloch v. Savage*, *Speers Eq.* 472; *Taylor v. Ross*, 11 Tenn. 330; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Reid v. Diamond Co.*, 85 Fed. 193, 29 C. C. A. 110; *Scott v. Melady*, 27 Ont. App. 193; *Elmore v. Kingscote*, 5 B. & C. 583. If the parties have not agreed upon the price, of course none need be named in the memorandum; *Hoadley v. M'Laine*, 10 Bing. 482; as the memorandum need not be any more definite than the actual contract, the law implying the price. *O'Neil v. Crain*, 67 Mo. 250.

credit²¹ if agreed upon, the subject-matter of the sale,²² and the place and time of delivery if selected.²³

It must be borne in mind that there is a distinction between the memorandum required by the statute of frauds, and a written contract. While a formal written contract is a sufficient memorandum under the statute, a memorandum which itself is not regarded as a contract, may be sufficient under the statute.²⁴ The statute provides for a memorandum of an oral contract, which is distinct from the contract;²⁵ hence a letter written to repudiate, but not denying,²⁶ a bargain, is a sufficient memorandum if the terms are stated.²⁷ Likewise, a letter written to some other person than the other party to the contract, will suffice.²⁸

21. 1 Mechem, Sales, 365, § 439; *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135; *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. 814.

22. 1 Mechem, Sales, 363, § 437; *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Pulse v. Miller*, 81 Ind. 190; *May v. Ward*, 134 Mass. 127; *Heffron v. Armsby*, 61 Mich. 505; *Clampet v. Bells*, 39 Minn. 272; *Holmes v. Evans*, 48 Miss. 247; *American Co. v. Mfg. Steel Co.*, 101 Fed. 200; *Thornton v. Kempster*, 5 Taunt. 786.

23. 1 Mechem, Sales, 365, § 440; *Fisher v. Andrews*, 94 Md. 46; *Hawkins v. Chace*, 36 Mass. 502; *Smith v. Shell*, 82 Mo. 215, 52 Am. Rep. 365; *Davis v. Shields*, 26 Wend. 341. If not agreed upon, the law implies a reasonable time, and the memorandum may be silent upon this point. *Kidder v. Flanders*, 73 N. H. 345.

24. *Bird v. Munroe*, 66 Me. 337, 22 Am. Rep. 571; *Townsend v. Hargraves*, 118 Mass. 325; *Saunderson v. Jackson*, 2 B. & P. 233.

25. 1 Mechem, Sales, 354, § 423.

26. *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Louisville Co. v. Lorick*, 29 S. Car. 533, 2 L. R. A. 212; *Bacon v. Eccles*, 43 Wis. 227; *Bailey v. Sweeting*, 9 C. B. N. S. 343, 30 L. J. C. P. 150.

27. 1 Mechem, Sales, 358, § 423.

28. 1 Mechem, Sales, 359, § 432; *Moss v. Atkinson*, 44 Cal. 3; *Warfield v. Cranberry Co.*, 63 Iowa, 312; *Fugate v. Hansford*, 13 Ky. 262; *Moore v. Mountcastle*, 61 Mo. 424; *Peabody v. Speyers*, 56 N. Y. 230; *Mizell v. Burnett*, 49 N. Car. 249; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166; *Singleton v. Hill*, 91 Wis. 51; *Ayliffe v. Tracy*, 2 P. Wms. 65. It is held that even a letter addressed by the defendant to his agent is sufficient. *Kleeman v. Collins*, 72 Ky. 460; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. 800; *Gibson v. Holland*, L. R. 1 C. P. 1, 35 L. J. C. P. 5. *Contra*: *Steel v. Fife*, 48 Iowa, 99, 30 Am. Rep. 338.

The memorandum need not be on one sheet,²⁹ but any number of papers may be taken together provided they are connected³⁰ or all are signed³¹ or one refers to the other so as to show the connection between them without the aid of oral evidence.³² Correspondence by letters³³ or by telegrams³⁴ very frequently constitutes the memorandum, each letter or telegram identifying a previous one.³⁵

The statute requires the memorandum to be signed; but the law is very liberal as to what constitutes a signa-

29. 1 Mechem, Sales, 355, § 426; *American Co. v. Porter*, 94 Iowa, 117; *Louisville Co. v. Lorick*, 29 S. Car. 533, 2 L. R. A. 212.

30. *Gordon v. Collett*, 102 N. Car. 532; *Mellon v. Davison*, 123 Pa. St. 298; *Jones v. Joyner*, 82 L. T. N. S. 768. An envelope may be taken with the enclosed letter to show to whom the letter was addressed. *Pearce v. Gardner* [1897], 1 Q. B. 688. See, also, *Tallman v. Franklin*, 14 N. Y. 584.

31. *Thayer v. Luce*, 22 Ohio St. 62.

32. 1 Mechem, Sales, 356, § 426; *Adams v. McMillin*, 7 Port. 73; *Devine v. Warner*, 76 Conn. 229; *Turner v. Lorillard Co.*, 100 Ga. 645, 62 Am. St. 345; *Ridgway v. Ingram*, 50 Ind. 148; *Horton v. McCarty*, 53 Me. 394; *Freeland v. Ritz*, 154 Mass. 257, 26 Am. St. 244, 12 L. R. A. 561; *Third B'k v. Steel*, 129 Mich. 434, 64 L. R. A. 119; *Olson v. Sharpless*, 53 Minn. 91; *Fisher v. Kuhn*, 54 Miss. 480; *Donovan v. Schoenhofer Co.*, 92 Mo. App. 341; *Fowler Co. v. Cottrell*, 38 Neb. 512; *Rafferty v. Lougee*, 63 N. H. 54; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Cobb v. Lumber Co.*, 57 W. Va. 49, 110 Am. St. 734; *Bayne v. Wiggins*, 139 U. S. 210, 35 L. ed. 144; *Griffith Co. v. Humber* [1899], 2 Q. B. 414. Reference in the unsigned to the signed, is not sufficient. *Thayer v. Luce*, 22 Ohio St. 62.

33. 1 Mechem, Sales, 357, § 428. A letter containing an offer, and a letter of acceptance, present a plain case. *Wilkinson v. Taylor Co.*, 67 Miss. 231; *Kenney v. Hews*, 26 Neb. 213; *Gulf Co. v. Settegast*, 79 Tex. 256.

34. 1 Mechem, Sales, 359, § 429; *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Watt v. Wisconsin Co.*, 63 Iowa, 730; *Lincoln v. Erie Co.*, 132 Mass. 129; *King v. Wood*, 7 Mo. 389; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Wells v. Railway Co.*, 30 Wis. 605.

35. Oral evidence is not admissible to show that even signed writings relate to the same transaction. *Jacob v. Kirk*, 2 M. & R. 221. This must be shown from the writings themselves.

ture. It may be by mark, by initials;³⁶ or may consist of the first name only; and it may be made with a rubber stamp,³⁷ or a signature already printed upon the paper may be adopted.³⁸ The signature may appear any place in the writing,³⁹ unless the statute requires the signature to be subscribed, in which case it follows that it must be at the end.⁴⁰ The signature must be that of the "parties to be charged,"⁴¹ which means that the signature must be that of the defendant in the action whether he is the seller or the buyer.⁴² The statute plain-

36. 1 Mechem, Sales, 371, § 451; *Sanborn v. Flagler*, 91 Mass. 474, *Griffin, Illus. Cas. on Pers. Prop.* 111; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Salmon Co. v. Goddard*, 55 U. S. 446, 14 L. ed. 493; *Sweet v. Lee*, 3 M. & G. 542.

37. *Re Deep R. B'k*, 73 Conn. 341; *Bennett v. Brumfitt*, L. R. 3 C. P. 28.

38. *Com. v. Ray*, 69 Mass. 441; *Grieb v. Cole*, 60 Mich. 397; *Saunders v. Jackson*, 2 B. & P. 238. In *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, the memorandum was on a printed letter-head of the defendants, but otherwise unsigned. *Held*, that the printed heading had been adopted as a signature.

39. *California Co. v. Scatena*, 117 Cal. 447; *Clason v. Bailey*, 14 Johns. 484; *Saunders v. Hackney*, 78 Tenn. 194; *Tingley v. Boom Co.*, 5 Wash. 644. The signature may be at the beginning of the memorandum; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343; *Hawkins v. Chace*, 36 Mass. 502; *Schneider v. Norris*, 2 M. & S. 286; or in the body thereof. *New Eng. Co. v. Standard Co.*, 165 Mass. 328, 52 Am. St. 516.

40. *Coon v. Rigden*, 4 Colo. 275; *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376. See, also, *California Co. v. Scatena*, 117 Cal. 447.

41. 1 Mechem, Sales, 370, § 449; *Ivory v. Murphy*, 36 Mo. 534; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. 17; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767; *Sabre v. Smith*, 62 N. H. 663; *Richards v. Green*, 23 N. J. Eq. 536; *Anderson v. Harold*, 10 Ohio, 399; *Case Co. v. Smith*, 16 Ore. 381; *Smith's App.*, 69 Pa. St. 474; *Douglass v. Spears*, 2 Nott & M. 207, 10 Am. Dec. 588; *De Cordova v. Smith*, 9 Tex. 129, 58 Am. Dec. 136; *Lowber v. Connit*, 36 Wis. 176. *Contra*: *Wilkerson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, on the ground of lack of mutuality.

42. *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. 123; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Old Corp. v. Evans*, 72 Mass. 25, 66 Am. Dec. 394; *Thornton v. Kempster*, 5 Taunt. 786. A written offer accepted orally is binding on the signer; *Hodges*

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ly provides that the signature may be made by a lawfully arthorized agent. One person may be the agent for each of the parties,⁴³ though one party cannot act as the agent for the other.⁴⁴

§ 166. **Sales—Conditions and Warranties.** Prior to the completion of the bargain between the seller and the buyer statements frequently are made, either voluntarily or in answer to questions, in regard to the subject-matter of the sale; or the circumstances justify the parties in the belief that certain facts do or do not exist or will or will not exist. These statements and presumed facts, known as conditions,⁴⁵ are precedent to the transfer of the ownership, and are said to be of the essence of the

v. Kowing, 58 Conn. 12, 7 L. R. A. 87; *Linton v. Williams*, 25 Ga. 391; *Newby v. Rogers*, 40 Ind. 9; *Kessler v. Smith*, 42 Minn. 494; *Mason v. Decker*, 72 N. Y. 595, 28 Am. Rep. 190; *Brandon Co. v. Morse*, 48 Vt. 322; *Allen v. Bennet*, 3 Taunt. 169; although not binding on the acceptor, thus resulting in the contract being enforceable at the option of the party who has not signed.

43. 1 Mechem, Sales, 377, § 459. An auctioneer is the most common illustration of one person acting as the agent for both the seller and the buyer in making a memorandum of the sale. 1 Mechem, Sales, 379, § 461; *Lewis v. Wells*, 50 Ala. 198; *Craig v. Godfrey*, 1 Cal. 415, 54 Am. Dec. 299; *White v. Crew*, 16 Ga. 416; *Hunt v. Gregg*, 8 Blackf. 105; *Garth v. Davis*, 120 Ky. 106; *Horton v. McCarty*, 53 Me. 394; *White v. Watkins*, 23 Mo. 423; *Tallman v. Franklin*, 14 N. Y. 584; *Gwathney v. Cason*, 74 N. Car. 5; *Pugh v. Chesseldine*, 11 Ohio, 109, 37 Am. Dec. 414; *Cathcart v. Keirnaghan*, 5 Strobh. 129; *Dawson v. Miller*, 20 Tex. 171; *Harvey v. Stevens*, 43 Vt. 653; *Walker v. Herring*, 62 Va. (21 Gratt.) 678, 8 Am. Rep. 616; *Atkinson v. Washington Col.*, 54 W. Va. 32; *Smith v. Arnold*, 5 Mason, 414; *Coate v. Terry*, 24 U. C. C. P. 571; *Simon v. Metwier*, 1 W. Bl. 599. The bidder, by the very act of bidding, calls on the auctioneer to put down his name as buyer. *Gill v. Bicknell*, 56 Mass. 355.

44. 1 Mechem, Sales, 373, § 452; *Boardman v. Spooner*, 95 Mass. 353, 90 Am. Dec. 196; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. 741; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Wilson v. Lewiston Co.*, 150 N. Y. 314, 55 Am. St. 680; *Adams v. Scales*, 48 Tenn. (1 Baxt.) 337, 25 Am. Rep. 772; *Strong v. Dodds*, 47 Vt. 348; *Farebrother v. Simmons*, 5 B. & Ald. 333.

45. See *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393.

contract, and, if not performed⁴⁶ by the party whose duty it is to perform them, justify the other party in refusing to perform in turn.

Conditions sometimes are called warranties; but a warranty in its strict, narrow and proper sense in the law of sales is a promise collateral⁴⁷ but annexed to the agreement to transfer title, by which the seller undertakes to vouch for the title, quality or condition of the thing sold,⁴⁸ the breach of which gives rise to a claim for damages only,⁴⁹ and not to a right to reject the goods or to repudiate the contract.⁵⁰ It is not easy to determine whether a stipulation in a contract of sale is a condition or a warranty proper,¹ and the uncertainty is a frequent source of litigation; for if a stipulation by the seller be a condition, the buyer may reject the goods tendered, they not being what he agreed to take; but if the stipulation be treated as a warranty merely, the buyer, in most jurisdictions, is under a duty to keep the goods² though they may not be what he expected, his

46. 2 Mechem, Sales, 1056, § 1218; Jones v. U. S., 36 U. S. 24.

47. Down v. Fisher, 55 Mass. 271; Fairbank Co. v. Metzger, 118 N. Y. 260, 16 Am. St. 753; McFarland v. Newman, 9 Watts, 55; Morris v. Bradley Co., 64 Fed. 55, 12 C. C. A. 34; Chanter v. Hopkins, 8 L. J. Exch. 14, 3 Jur. 58, 4 M. & W. 399, 1 H. & H. 377.

48. 2 Mechem, Sales, 1061, § 1222.

49. Huyett Co. v. Gray, 124 N. Car. 322; Thornton v. Wynn, 25 U. S. 183, 6 L. ed. 595; Street v. Blay, 2 B. & Ad. 456.

50. 2 Mechem, Sales, 1068, § 1231.

1. Bentsen v. Taylor (1893), 2 Q. B. 274, Ingler, Cas. in Sales, 39. A stipulation may be construed by the court as a condition although designated as a warranty in the contract.

2. Worcester Co. v. Brass Co., 73 Conn. 554; Hoover v. Sidener, 98 Ind. 290; Lightburn v. Cooper, 31 Ky. 273; H. W. Williams Line v. Transportation Co., 129 Mich. 209, 56 L. R. A. 939; Lynch v. Curfman, 65 Minn. 170; Muller v. Eno, 14 N. Y. 597; Freyman v. Knecht, 78 Pa. St. 141; Allen v. Anderson, 22 Tenn. 581, 39 Am. Dec. 197; Wright v. Davenport, 44 Tex. 164; Matteson v. Holt, 45 Vt. 336; Payne v. Whale, 7 East, 274.

Contra: Hodge v. Tufts, 115 Ala. 366; Upton Co. v. Hulske, 69 Iowa, 557; Gale Co. v. Stark, 45 Kans. 606, 23 Am. St. 739; Libby v. Haley, 91 Me. 331; Smith v. Hale, 158 Mass. 178, 35 Am. St. 485; Branson v. Turner, 77 Mo. 489; Parry Co. v. Tobin, 106 Wis. 236.

remedy being merely a claim for damages for a breach of the warranty, unless an express term in the contract allows him to return them for breach of warranty.³ A breach of a condition may be waived by the buyer, who may accept the goods, treating the condition as a warranty,⁴ and having a claim for damages for its breach. A sub-buyer cannot sue the original seller for a breach of warranty given to the buyer.⁵

3. *Mayes v. Rogers*, 47 Ill. App. 372, Ingler, Cas. in Sales, 45; *McCormick Co. v. Knoll*, 57 Neb. 790; *Eyers v. Haddem*, 70 Fed. 648; *Bannerman v. White*, 10 C. B. N. S. 844, 860.

4. *Eagle W'ks v. R'y Co.*, 101 Iowa, 289; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438; *Fairbank Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. 753; *Morse v. Stockyard Co.*, 21 Ore. 289, 14 L. R. A. 157; *Holloway v. Jacoby*, 120 Pa. St. 583; *Hellbutt v. Hickson*, L. R. 7 C. P. 438, Ingler, Cas. in Sales, 42.

Thus where the contract was to furnish "good, clear, merchantable ice," and the seller tendered ice which did not correspond with the agreement, the buyer could refuse it for non-performance of the conditions of the sale, or he could accept it, treat the condition as a warranty, and claim damages for a breach of the warranty that the ice was not as represented. Acceptance of the goods without objection at the time, is not a waiver of defects, although some evidence thereof. *Morse v. Moore*, 83 Me. 473, Ingler, Cas. in Sales, 38.

If the fulfillment of a condition is prevented by the other party, it is waived. *McPherson v. Walker*, 40 Ill. 371; *Smyth v. Craig*, 3 Watts & S. 14; *U. S. v. Peck*, 102 U. S. 64; *Mackay v. Dick*, 6 App. Cas. 251. Thus, where there was a sale of a crop by a tenant to his landlord, delivery to be made by a designated time, and the landlord delayed giving the tenant possession of the premises, the condition as to the time of delivery was waived by the landlord.

5. *Nelson v. Armour Co.*, 76 Ark. 352 (warranty of quality); *Kendig v. Giles*, 9 Fla. 278; *Smith v. Williams*, 117 Ga. 782, 97 Am. St. 220 (warranty of title); *Zuckerman v. Solomon*, 73 Ill. 130; *Prater v. Campbell*, 110 Ky. 23, 22 Ky. Law Rep. 1510; *Lebourdais v. Vitrified Co.*, 194 Mass. 341; *Tomlinson v. Armour*, 74 N. J. L. 274; *Bordwell v. Collier*, 45 N. Y. 494; *Post v. Burnham*, 83 Fed. 79, 27 C. C. A. 455. In other words, there is no privity of contract between the seller and a sub-buyer; and a warranty does not "run with the goods" as a covenant of warranty runs with the land. See *Phillips v. Vermillion*, 91 Ill. App. 133; *Thisler v. Keith*, 7 Kans. App. 363; *Carter v. Harden*, 78 Me. 528; *Clark v. People's Co.*, 46 Mo. App. 248; *Talley v. Beever*, 33 Tex. Civ. App. 675.

§ 167. **Sales—Warranties—Classification.** Warranties may be express or implied;⁶ and express warranties may be oral or written,⁷ absolute or conditional,⁸ and general or special.

§ 168. **Sales—Express Warranties.** An Express Warranty is one created by the act of the seller in direct and positive terms.⁹ The law does not require any formality in a warranty.¹⁰ The use of incorrect or ungrammatical terms will not prevent liability on the part of the seller if he makes a statement positively which is relied on by the buyer;¹¹ nor need the word “warrant” or “warranty” be used.¹² In popular language a war-

6. 2 Mechem, Sales, 1068, § 1233.

7. *Parker v. McFerrin*, 103 Ala. 132; *Conkling v. Standard Co.*, 132 Iowa, 596; *Lindsay v. Davis*, 30 Mo. 406.

8. 2 Mechem, Sales, 1068, § 1232.

9. 2 Mechem, Sales, 1069, § 1234. See *Torkelson v. Jorgenson*, 28 Minn. 383.

10. 2 Mechem, Sales, 1069, § 1235; *Tabor v. Peters*, 74 Ala. 90, 49 Am. Rep. 804; *Polhemus v. Heiman*, 45 Cal. 573; *Collins v. Tigner*, 5 Pennw. 345; *Burge v. Stroberg*, 42 Ga. 88; *Towell v. Gatewood*, 3 Ill. 22, 33 Am. Dec. 437; *Jones v. Quick*, 28 Ind. 125; *Switzer v. Pinconning Co.*, 59 Mich. 488; *Kinley v. Fitzpatrick*, 5 Miss. 59, 34 Am. Dec. 108; *Carter v. Black*, 46 Mo. 384; *Shuman v. Heater* (Neb.), 106 N. W. 1042; *Morrill v. Wallace*, 9 N. H. 111; *Fairbank Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. 753; *Woodridge v. Brown*, 149 N. Car. 299; *McFarland v. Newman*, 9 Watts, 55, 34 Am. Dec. 497; *McGregor v. Penn*, 17 Tenn. 74; *Beeman v. Buck*, 3 Vt. 53, 21 Am. Dec. 571.

11. Reliance upon a warranty is indispensable to a recovery upon it. *Taymon v. Mitchell*, 1 Md. Ch. 496; *Deyo v. Hammond*, 102 Mich. 122; *Torkelson v. Jorgenson*, 28 Minn. 383; *Watson v. Roode*, 30 Neb. 264; *Fairbank Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. 753. *Contra*: *Shordan v. Kyler*, 87 Ind. 38. See Uniform Sales Act, § 12. It is sufficient if the buyer would not have purchased, although the warranty was not the sole inducement. *Hicks v. Stevens*, 121 Ill. 186; *Mitchell v. Pinckney*, 127 Iowa, 696; *Keelly v. Turbeville*, 79 Tenn. 339.

12. *Riddle v. Webb*, 110 Ala. 599; *Buckman v. Haney*, 11 Ark. 339; *Robinson v. Harvey*, 82 Ill. 58; *Latham v. Shipley*, 86 Iowa, 543; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Henshaw v. Robbins*, 50 Mass. 83, 43 Am. Dec. 367; *Warder v. Bowen*, 31 Minn.

ranty frequently is called a guaranty.¹³ "I guarantee them hosses is all right," would be equivalent to, "I warrant these horses to be sound."¹⁴

The seller cannot escape liability because he did not intend to convey the impression made, if his language justified the buyer in reaching the conclusion he did.¹⁵ In law the intention of a person is to be gathered from what others are justified in supposing he intends from what he says and does,¹⁶ and not from what he mentally

335; *Unland v. Garton*, 48 Neb. 202; *Chapman v. Murch*, 19 Johns. 290, 10 Am. Dec. 227; *Welmer v. Clement*, 37 Pa. St. 147, 78 Am. Dec. 411; *Austin v. Nickerson*, 21 Wis. 549; *Hopkins v. Tanquary*, 23 L. J. C. P. 162, 15 C. B. 130, 2 C. L. R. 342, 80 Eng. Com. Law, 130, 18 Jur. 608, 2 Wkly. Rep. 475.

13. "Warranty" and "guaranty" come from the French *garantie*, and were ingrafted upon the English common law along with a number of other Norman French words. Many French words beginning with "g" changed that letter into "w" when they became a part of the English language, as *guerre*, war, *gages*, wages, and the like. A few underwent the change, and also retained the original form, so that two English words resulted, as in the case of "guaranty" and "warranty;" and these two words, for some time, had the same meaning. In modern law, however, a guaranty technically is a contract of suretyship, being a collateral contract relating to persons and to the future; while a warranty is a direct undertaking between two parties only, and relates to things, and to the present or past. While a warranty apparently relates to the future, as that a machine will last five years, it really means that the machine is so well constructed and of such material, that it should last that long. It is a warranty of durability based on its present condition, and the seller does not insure its future existence. See *Lederer v. Yule*, 67 N. J. Eq. 65; *Landreth v. Wyckoff* (N. Y.), 67 App. Div. 145; 3 Blacks. Comm. 165.

14. See *Kingsley v. Johnson*, 49 Conn. 462; *Powell v. Chittick*, 89 Iowa, 513; *McClintock v. Emick*, 87 Ky. 160, 9 Ky. Law Rep. 995; *Little v. Woodworth*, 8 Neb. 281; *Money v. Fisher*, 92 Hun. 347; *Smith v. Justice*, 13 Wis. 600; 2 Mechem, Sales, 1103, § 1269.

15. 2 Mechem, Sales, 1071, § 1237; *Zimmerman v. Brannon*, 103 Iowa, 144; *Hawkins v. Pemberton*, 51 N. Y. 198, 202, 10 Am. Rep. 595; *Ingraham v. Railroad Co.*, 19 R. I. 356; *Reese v. Bates*, 94 Va. 321; *Neave v. Arntz*, 56 Wis. 176.

16. *Reed v. Hastings*, 61 Ill. 266; *Schlitching v. Rowell* (Iowa), 119 N. W. 151; *Halliday v. Briggs*, 15 Neb. 219; 2 Mechem, Sales, 1072, § 1237.

intends; nor is it any defense that the seller made an untrue statement in good faith, if made as a part of the agreement, the question of fraud not being involved.¹⁷

However, not all representations made by the seller are conditions or warranties. Statements made to the buyer by the seller prior to the time negotiations were begun, and which were not designed to be a term in the contract,¹⁸ are not warranties, and there is no legal liability on the part of the seller if such statements were made honestly, this being known in the law of contracts as "misrepresentation."¹⁹ Likewise, statements by the seller are not warranties if a sale afterwards is made "without warranties."²⁰ Statements of opinion,²¹ made

17. 2 Mechem, Sales, 1073, § 1239; Riddle v. Webb, 110 Ala. 599; Bartholomew v. Bushnell, 20 Conn. 271, 52 Am. Dec. 338; Cummins v. Ennis, 4 Pennew. 424; Snowden v. Waterman, 100 Ga. 588; Bedford v. Magibben, 12 Ky. Law Rep. 193; Marston v. Knight, 29 Me. 341; Hyatt v. Boyle, 5 Gill & J. 110, 25 Am. Dec. 276; Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103; Van Hoesen v. Cameron, 54 Mich. 609; McKee v. Jones, 67 Miss. 405; Brisbane v. Parsons, 33 N. Y. 332; Larson v. Calder, 16 N. Dak. 248; Gartner v. Corwine, 57 Ohio St. 246; Vanleer v. Earle, 26 Pa. St. 277; Martin v. Howil, 2 Treadw. 750; Waterbury v. Russell, 55 Tenn. (8 Baxt.) 159; Norris v. Parker, 15 Tex. Civ. App. 117; Anonymous, Lofft, 146, 98 Eng. Reprint, 579.

18. Zimmerman v. Morrow, 28 Minn. 367.

19. A false statement made by the seller may be a warranty whether made intentionally or honestly; if made deliberately or recklessly, it would be fraud, and the seller would be liable in tort for his deceit, or the sale could be rescinded for fraud, as any other contract, but this is foreign to the liability on the warranty. 2 Mechem, Sales, 1065, § 1224. While every representation which is not true is a misrepresentation, the word "misrepresentation" technically in the law of contracts means a false representation made honestly under such circumstances that liability therefor does not attach.

20. Lynch v. Curfman, 65 Minn. 170; Hopkins v. Tanqueray, 15 C. B. 130, 80 Eng. Com. Law, 129.

21. 2 Mechem, Sales, 1076, § 1241; Englehardt v. Clanton, 33 Ala. 336; Sauerman v. Simmons, 74 Ark. 563; Collins v. Tigner, 5 Pennew. 345; Ragsdale v. Shipp, 108 Ga. 817; Towell v. Gatewood, 3 Ill. 22, 33 Am. Dec. 437; Myers v. Conway, 62 Ind. 474; McDonald Co. v. Thomas, 53 Iowa, 558; Lamme v. Gregg, 58 Ky. 444, 71 Am. Dec. 489; Chilton v. Jones, 4 Harr. & J. 62; Henshaw v. Robins, 50

at any time, such as the value of the subject-matter of the sale,²² are not warranties. If the contract be reduced to writing, evidence of an oral contract is inadmissible²³

Mass. 33, 43 Am. Dec. 367; Switzer v. Pinconning Co., 59 Mich. 488; Holt v. Sims, 94 Minn. 157; Matlock v. Meyers, 64 Mo. 531; Lander v. Sheehan, 32 Mont. 25; Burr v. Redhead Co., 52 Nebr. 617; Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428; Osborne v. McCoy, 107 N. Car. 726; Jackson v. Wetherill, 7 Serg. & R. 480; Blythe v. Speake, 23 Tex. 429; Bond v. Clark, 35 Vt. 577; Mason v. Chappell, 56 Va. (15 Gratt.) 572; Montreal Co. v. Mihills, 80 Wis. 540; Schroeder v. Trubee, 35 Fed. 652; Jendwine v. Slade, 2 Esp. 572.

The Latin maxim is *simplex commendatio non obligat* (mere praise does not bind). Taylor v. Peters, 74 Ala. 90, 49 Am. Rep. 804; Wheeler v. Reed, 36 Ill. 81; Tewkesbury v. Bennett, 31 Iowa, 83; Taymon v. Mitchell, 1 Md. Ch. 496; Hogins v. Plympton, 23 Mass. 97; Childs v. O'Donnell, 84 Mich. 533; Ryan v. Ulmer, 108 Pa. St. 332, 56 Am. Rep. 210, 137 Pa. St. 309; Barrett v. Hall, 1 Aik. 269. A declaration that goods are "fine," "nice," "choice," or "good," is simply "dealer's talk," and such expressions are not warranties.

Generally anything as to the future is a matter of opinion, as the seller does not know any more about it than the buyer. Thus, what an animal will produce or will do, is not a warranty. Roberts v. Applegate, 153 Ill. 210; Richardson v. Coffman, 87 Iowa, 121; Bryant v. Crosby, 40 Me. 9.

22. 2 Mechem, Sales, 1082, § 1245. The buyer is as competent to decide what the article is worth, as the seller is.

23. Wren v. Wardlaw, Minor, 363, 12 Am. Dec. 60; Ft. Collins B'k v. Hughes (Cal. 1896), 46 Pac. 272; Mullain v. Thomas, 43 Conn. 252; Baldwin v. Daniel, 69 Ga. 782; Vierling v. Furnace Co., 170 Ill. 189; Conant v. Bank, 121 Ind. 323; Barrett v. Wheeler, 71 Iowa, 662; Delbold Co. v. Huston, 55 Kans. 104, 28 L. R. A. 53; Worland v. Secrest, 106 Ky. 711, 21 Ky. Law Rep. 363; Buhler v. McHatton, 60 La. (9 La. Ann.) 192; Thomson v. Gortner, 73 Md. 474; Frost v. Blanchard, 97 Mass. 155; McCray Co. v. Woods, 99 Mich. 269, 41 Am. St. 599; McNaughton v. Wall, 99 Minn. 92; Rollins Co. v. Forge Co., 73 N. H. 92, 68 L. R. A. 441; Naumberg v. Young, 44 N. J. L. 331; Mumford v. McPherson, 1 Johns. 414, 3 Am. Dec. 339; Plano Co. v. Root, 3 N. Dak. 165; Smith v. McCall, 1 McCord, 220, 10 Am. Dec. 666; McKenzie v. Kerr, 37 Tenn. 539; Bond v. Clark, 35 Vt. 577; Johnston v. Mendenhall, 9 W. Va. 112; J. I. Case W'ks. v. Niles, 90 Wis. 590; Seitz v. Brewers' Co., 141 U. S. 510, 35 L. ed. 837, Ingler, Cas. in Sales, 57; Northey Co. v. Sanders, 31 Ont. 475; Kain v. Old, 2 L. J. K. B. O. S. 102, 2 B. & C. 627, 4 D. & R. 52, 9 Eng. Com. Law, 274, 26 Rev. Rep. 497.

If the acceptance of a written warranty was procured by fraud, as where advantage was taken of the illiteracy of the buyer, an oral

unless the writing is not intended to be final and complete,²⁴ such as a receipt.²⁵

An Absolute warranty is one without limitations, and not dependent upon conditions, most warranties being absolute. A Conditional warranty is one given with certain terms or conditions. Thus on a sale of an agricultural implement it is common for the seller to stipulate that the buyer shall proceed to test it at once, and in case it proves defective to notify the seller and to give him an opportunity to remedy the defect.²⁶

warranty can be shown notwithstanding; *Aultman v. Falkum*, 51 Minn. 562; or if the warranty was omitted by mistake; *Huston v. Peterson*, 2 Kans. App. 315; or if there has been a subsequent change in the contract; *Thomas v. Barnes*, 156 Mass. 581; or if a written warranty, never agreed to and different from the oral warranty, was handed to the buyer without his knowledge among other papers. *Valerius v. Hocksplere*, 87 Iowa, 332,

24. *Mechem, Sales*, 1089, § 1255; *Ruff v. Jarrett*, 94 Ill. 475; *Crist v. Jacobs*, 10 Ind. App. 688 (note for price); *Jackson v. Mott*, 76 Iowa, 263 (order for goods); *Gale Co. v. Stark*, 45 Kans. 606, 23 Am. St. 736 (note for price); *McCormick Co. v. Arnold*, 116 Ky. 508, 25 Ky. Law Rep. 663 (order for goods); *Neal v. Flint*, 88 Me. 72; *Phelps v. Whitaker*, 37 Mich. 72 (order for wind-mill); *Potter v. Easton*, 82 Minn. 247; *Foot v. Bently*, 44 N. Y. 166, 4 Am. Rep. 652; *Hadley v. Bordo*, 62 Vt. 285; *Nauman v. Ullman*, 102 Wis. 92 (conditional sale note); *Seltz v. Brewers' Co.*, 141 U. S. 510, 35 L. ed. 837, *Ingler, Cas. in Sales*, 57; *McMullen v. Williams*, 5 Ont. App. 518; *Allen v. Pink*, 7 L. J. Exch. 209, 4 M. & W. 140, 1 H. & H. 207.

25. 2 *Mechem, Sales*, 1091, § 1255; *Atwater v. Clancy*, 107 Mass. 369; *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449.

26. 2 *Mechem, Sales*, 1195, § 1383. Failure to perform the conditions relieves the seller from liability on the warranty. *Byrd v. Printing Co.*, 90 Ga. 542; *Springfield Co. v. Kennedy*, 7 Ind. App. 502; *Russell v. Murdock*, 79 Iowa, 101, 18 Am. St. 348; *Champion Co. v. Mann*, 42 Kans. 372; *Central Co. v. Arctic Co.*, 77 Md. 202; *Turner v. Muskegon Co.*, 97 Mich. 166; *Latham v. Baussman*, 39 Minn. 57; *McCormick Co. v. Hartman*, 35 Nebr. 629; *Fahey v. Esterley Co.*, 3 N. Dak. 220, 44 Am. St. 554; *Butler v. Leighton*, 149 Pa. St. 351; *Bonham Co. v. McKellar*, 86 Tex. 694; *Waters Co. v. Mansfield*, 48 Vt. 378; *Staver v. Rogers*, 3 Wash. 608; *Palmer v. Branfield*, 86 Wis. 441; *Pullman Co. v. Metropolitan Co.*, 157 U. S. 94, 39 L. ed. 632; 2 *Mechem, Sales*, 1197, § 1384.

A General warranty is one which is not limited to any special point. A Special warranty is one confined to some particular matter. Thus, a warranty that a horse is sound would be general; while a warranty that the horse did not have some designated disease or defect, would be special. A general warranty does not cover defects which the buyer must have observed,²⁷ or of which the buyer knows.²⁸ Thus, a warranty that a blind horse is sound, means that he is sound except as to his eyes, if the buyer knew of the blindness.

§ 169. Sales—Implied Condition of Title. An Implied warranty is one which the law imputes to the seller by reason of the nature, circumstances, or subject-matter of the contract of sale,²⁹ unless the contract shows a contrary intention.³⁰ Implied warranties, or covenants in

27. *Thompson v. Harvey*, 86 Ala. 519; *Thompson v. Bertrand*, 23 Ark. 730; *Huston v. Plato*, 3 Colo. 402; *Ragsdale v. Shipp*, 103 Ga. 817; *O. H. Jewell Co. v. Kirk*, 102 Ill. App. 246, *aff'd* 200 Ill. 382; *Connorsville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214; *Storrs v. Emerson*, 72 Iowa, 390; *Scott v. Geiser Co.*, 70 Kans. 498; *Berret v. Adams*, 61 La. (10 La. Ann.) 77; *McCormick v. Kelly*, 28 Minn. 135, *Ingler, Cas. in Sales*, 52; *Stewart v. Dugin*, 4 Mo. 245, 28 Am. Dec. 348; *Leavitt v. Fletcher*, 60 N. H. 182; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Scarborough v. Reynolds*, 13 Rich. 98; *Fisher v. Pollard*, 39 Tenn. 314, 75 Am. Dec. 740; *Williams v. Ingram*, 21 Tex. 300; *Drew v. Edmunds*, 60 Vt. 401, 6 Am. St. 122; *Butterfield v. Burroughs*, 1 Salk. 211.

This rule does not apply if the defect, although apparent, requires special skill to understand it, and it is not understood by the buyer. *Jordan v. Foster*, 11 Ark. 139; *Burton v. Young*, 5 Harr. 233; *Brown v. Bigelow*, 92 Mass. 242; *Birdseye v. Frost*, 34 Barb. 367; *Stucky v. Clyburn*, Cheves, 186, 34 Am. Dec. 590; *Pinney v. Andrus*, 41 Vt. 631.

28. *Harwood v. Breese*, 73 Nebr. 521.

The reason for this rule rests upon the presumed intention of the parties. The seller cannot be supposed to state and the buyer to rely upon what is known by each to be untrue. *Chadsey v. Greene*, 24 Conn. 562; *Brown v. Bigelow*, 92 Mass. 242.

29. 2 *Mechem, Sales*, 1117, § 1295; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317.

30. 2 *Mechem, Sales*, 1127, § 1309; *Hartin Co. v. Pelt*, 76 Ark. 177; *Miller v. Van Tassel*, 24 Cal. 453; *Fauntleroy v. Wilcox*, 80 Ill.

law, are founded on reason and the presumed intention of the parties.³¹ The most common relate to title, quality, fitness, and genuineness.³² Thus there is an implied condition that the seller, in case of a sale of specific goods in his possession,³³ had a right to sell; or, in case of a contract to sell, that he will have a right to sell the goods at the time the ownership is to pass.³⁴ This results from the very object of a sale—to transfer the absolute or general title; and the condition lies at the very threshold

477; *Burnett v. Henaley*, 118 Iowa, 575; *Lynch v. Curtman*, 65 Minn. 170, *Hutcheson v. Minis*, 15 Miss. 388; *Hardt v. Western Co.*, (N. Y.) 84 App. Div. 249; *Boinest v. Leignex*, 2 Rich. 464; *Wood v. Ross* (Tex. Civ. App. 1894), 26 S. W. 148; *Moore v. The Morgan*, 17 Fed. Cas. No. 9, 754; *Hall v. Conder*, 2 C. B. N. S. 22.

31. *The Moorcock*, 4 P. D. 68.

32. 2 *Mechem, Sales*, 1068, § 1233.

33. 2 *Mechem, Sales*, 1121, § 1302; *Williamson v. Sammons*, 34 Ala. 691; *Mason v. Bohannon*, 79 Ark. 435, *Starr v. Anderson*, 19 Conn. 338; *Lines v. Smith*, 4 Fla. 47; *Elgin Co. v. Estes*, 122 Ga. 807; *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278; *Marshall v. Duke*, 51 Ind. 62; *Barton v. Faherty*, 3 Greene, 327, 54 Am. Dec. 503; *Paulsen v. Hall*, 39 Kans. 365; *Chancellor v. Wiggins*, 48 Ky. 201, 39 Am. Dec. 499; *Maxfield v. Jones*, 76 Me. 135; *Rice v. Forsyth*, 41 Md. 389; *Perly v. Balch*, 40 Mass. 283, 34 Am. Dec. 56, *Griffin, Illus. Cas. on Pers. Prop.* 149; *Croly v. Pollard*, 71 Mich. 612; *Close v. Crossland*, 47 Minn. 500; *Inglis, Cas. in Sales*, 67; *Lille v. Hopkins*, 20 Miss. 299, 51 Am. Dec. 115; *Matheny v. Mason*, 73 Mo. 677, 39 Am. Rep. 541; *Budd v. Power*, 8 Mont. 380; *Hall v. Aitkin*, 25 Nebr. 360; *Sargent v. Currier*, 49 N. H. 310, 6 Am. Rep. 524; *Wood v. Sheldon*, 42 N. J. L. 421, 36 Am. Rep. 523; *Burt v. Dewey*, 40 N. Y. 283, 100 Am. Dec. 482; *Inge v. Bond*, 10 N. Car. 101; *Darst v. Brockway*, 11 Ohio, 462; *Clevenger v. Lewis*, 20 Okla. 837, 16 L. R. A. N. S. 410; *Balte v. Bedemiller*, 37 Oreg. 27, 82 Am. St. 737; *Eagan v. Call*, 34 Pa. St. 236, 75 Am. Dec. 653; *Burgess v. Wilkinson*, 13 R. I. 646; *Moore v. Lanham* (S. Car.), 3 Hill, 299; *Richardson v. Marshall County*, 100 Tenn. 346; *Gilchrist v. Hilliard*, 53 Vt. 592, 38 Am. Rep. 706; *Jarrett v. Goodnow*, 39 W. Va. 602, 32 L. R. A. 321; *Edgerton v. Michels*, 66 Wis. 124; *Boyd v. Bopst*, 2 U. S. 91, 1 L. ed. 302; *McFatrige v. Robb*, 24 Nova Sco. 506; *Elchholz v. Bannister*, 34 L. J. C. P. 105, 12 L. T. Rep. N. S. 76, 17 C. B. N. S. 708, 112 Eng. Com. Law, 708, 11 Jur. N. S. 15, 13 W'kly. Rep. 96, *Inglis, Cas. in Sales*, 60.

34. 2 *Mechem, Sales*, 1120, § 1300; *Uniform Sales Act*, § 12 (1).

of the whole contract,³⁵ as the buyer expects to buy the subject-matter of the sale and not a lawsuit.³⁶ If the seller did not have title at the time of the sale, but subsequently acquires it, it will inure to the benefit of the buyer under the implied warranty.³⁷ There is, however, no implied conditions as to title where the seller professes to sell by virtue of authority in fact or law, such as a mortgagee or a sheriff,³⁸ or where the buyer has notice;³⁹

35. 2 Mechem, Sales, 1049, § 1205. The theory is that an offer by a person to sell property in his possession is an affirmation of title. *Payne v. Rodden*, 7 Ky. 304, 7 Am. Dec. 739; *Thurston v. Spratt*, 52 Me. 202; *Shattuck v. Green*, 104 Mass. 42; *Hunt v. Sackett*, 31 Mich. 18; *Schell v. Stephens*, 50 Mo. 375; *Gould v. Bourgeois*, 51 N. J. L., 361; *Cohn v. Ammidown*, 120 N. Y. 398; *Whitaker v. Eastwick*, 75 Pa. St. 229; *Gookin v. Graham*, 24 Tenn. 480; *Byrnside v. Burdett*, 15 W. Va. 702.

36. *Edwards v. Pearson*, 6 L. T. Rep. 220.

37. 2 Mechem, Sales, 1125, § 1305; *Fowles v. Vallandigham*, 43 Ill. 269; *Hickman v. Dill*, 39 Mo. App. 246; *Kane v. Loder*, 56 N. J. Eq. 268; *Maskelinski v. Wazsineski*, 48 N. Y. St. 407; *Gookin v. Graham*, 24 Tenn., 480; *Sherman v. Transportation Co.*, 31 Vt. 162. It is otherwise, however, if a warranty is not implied. *Scranton v. Clark*, 39 N. Y. 220, 100 Am. Dec. 430.

38. 2 Mechem, Sales, 1126, § 1307; *Lang's Heirs v. Waring*, 25 Ala. 625, 60 Am. Dec. 533 (sheriff); *Bartholomew v. Warner*, 32 Conn. 98; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399 (personal representative); *Brandon v. Brown*, 106 Ill. 519 (personal representative); *Neal v. Gillaspay*, 56 Ind. 451 (sheriff); *Harris v. Lynn*, 25 Kans. 281, 37 Am. Rep. 253 (mortgagee); *Harrison v. Shanks*, 76 Ky. 620; *Mockbee v. Gardner*, 2 Harr. & G. 176, 177, *Ingler*, Cas. in Sales, 73 (personal representative); *Blood v. French*, 75 Mass. 197; *Mercer v. Leithy*, 139 Mich. 447, (auctioneer); *Johnson v. Laybourn*, 56 Minn. 332, *Ingler*, Cas. in Sales, 72 (assignee in insolvency); *Storm v. Smith*, 43 Miss. 497 (guardian); *Stephens v. Eells*, 65 Mo. 456; *Cohn v. Ammidown*, 120 N. Y. 398, (mortgagee); *Hicks v. Skinner*, 71 N. Car. 539; *Mechanics' Ass'n v. O'Connor*, 29 Ohio St. 651; *Evans v. Dendy*, 2 Speers, 9, 42 Am. Dec. 356; *Scott v. Hix*, 34 Tenn. 192; *The Monte Allegre*, 22 U. S. 616, 6 L. ed. 174 (U. S. Marshal); *Chapman v. Speller*, 14 Q. B. 621, 19 L. J. Q. B. 241; *Uniform Sales Act*, § 13 (4). Such persons may make themselves liable by an express warranty. *Johnston v. Barker*, 20 Up. Can. Q. B. 223.

39. *Hopkins v. Grinnell*, 28 Barb. 533; *Baguseley v. Hawley*, L. R. 2. C. P. 625.

or where the transaction is a mere assignment of the seller's interest.⁴⁰

§ 170. Sales—Implied Warranty against Incumbrances and of Quiet Possession. There is an implied warranty that the goods shall be free, at the time of the sale, from any charge or incumbrance in favor of any third person not declared or known to the buyer before or at the time the contract is made,⁴¹ for the implied warranty of title is a warranty as to the whole title,⁴² and it therefore protects against partial defects;⁴³ and there is a further implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.⁴⁴

§ 171. Implied Condition in Sales by Sample and Description. Where there is a contract for the sale of goods by sample, there is an implied condition that the bulk

40. *First B'k v. Mass. Co.*, 123 Mass. 330; *Croly v. Pollard*, 71 Mich. 612; *Gould v. Bourgeois*, 51 N. J. L. 361, *Griffin, Illus. Cas. on Pers. Prop.*, 135, *Ingler, Cas. in Sales*, 69; *Hopkins v. Grinnell*, 28 Barb. 533; *Porter v. Bright*, 82 Pa. St. 441, *Ingler, Cas. in Sales*, 71; *Penchen v. Imperial B'k*, 20 Ont. 325; *Page v. Cowajee Eduljee*, L. R. 1 P. C. 127.

41. *Williamson v. Sammons*, 34 Ala. 691; *Boyd v. Whitfield*, 19 Ark. 447; *Dean v. Mason*, 4 Conn. 423; *Linton v. Porter*, 31 Ill. 107, *Ingler, Cas. in Sales*, 67; *Tipton v. Triplett*, 53 Ky. 570; *Brown v. Pierce*, 97 Mass. 46; *Vibbard v. Johnson*, 19 Johns. 78; *Willing v. Peters*, 12 Serg. & R. 181; *Word v. Cavin*, 38 Tenn. 506; *Brown v. Cockburn*, 37 Up. Can. Q. B. 592; *Doe v. Stanlon*, 1 M. & W. 701; *Uniform Sales Act*, § 13 (3).

42. 2 *Mechem, Sales*, 1125, § 1304.

43. *Miller v. Van Tassel*, 24 Cal. 458; *Sargent v. Currier*, 49 N. H. 311; *Trigg v. Faris*, 24 Tenn. 343; *Lane v. Romer*, 2 Chandl. 65.

The warranty is broken by the existence of an outstanding mortgage. *Close v. Crossland*, 47 Minn. 500, *Ingler, Cas. in Sales*, 67; *Hickman v. Dill*, 39 Mo. App. 246; *Hall v. Aitkin*, 25 Nebr. 360; *Dresser v. Ainsworth*, 9 Barb. 619; *Hodges v. Wilkinson*, 111 N. Car. 56, 17 L. R. A. 545.

The warranty is broken also by any restrictions on the use of the article under valid patents. *Siegel v. Brooke*, 25 Ill. App. 207; *Electro Co. v. The Electron*, 74 Fed. 689, 21 C. C. A. 12, 45 U. S. App. 16. See, also, *Lowman v. Excelsior Co.*, 104 Ala. 367.

44. *McGiffin v. Baird*, 62 N. Y. 329; *Uniform Sales Act*, § 13 (2).

is equal to the sample in quality, kind and nature,⁴⁵ and that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;⁴⁶ and in a sale by description there is an implied condition that the goods shall correspond with the description.⁴⁷ If the sale is by

45. 2 Mechem, Sales, 1185, § 1320; *Penn. v. Smith*, 93 Ala. 476, 98 Ala. 560, 104 Ala. 445; *Hughes v. Bray*, 60 Cal. 284; *Worcester Co. v. Waterbury Co.*, 73 Conn. 554; *Love v. Barnesville Co.*, 3 Pennw. 152; *Hanson v. Busse*, 45 Ill. 496, *Pattee, Illus. Cas. in Personalty*, 381; *Brigham v. Retelsdorf*, 73 Iowa, 712; *Gill v. Kaufman*, 16 Kans. 571; *Hall v. Plassan*, 70 La. (19 La. Ann.) 11; *Gunther v. Atwell*, 19 Md. 157; *Gould v. Stein*, 149 Mass. 570, 14 Am. St. 455, 5 L. R. A. 213, *Ingler, Cas. in Sales*, 77; *Day v. Raguet*, 14 Minn. 273; *Graff v. Foster*, 67 Mo. 512; *Boothby v. Plaisted*, 51 N. H. 436, 12 Am. Rep. 140; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Dayton v. Hoogland*, 39-Ohio St. 671; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Proctor v. Spratley*, 78 Va. 254; *Barnard v. Kellogg*, 77 U. S. 383, 19 L. ed. 987, *Ingler, Cas. in Sales*, 79; *Parker v. Palmer*, 4 B. & Ald. 387, 391; *Uniform Sales Act* § 16 (a). See, also, *Boyd v. Wilson*, 83 Pa. St. 319, 24 Am. Rep. 176.

46. *Magee v. Billingsley*, 3 Ala. 679; *McNeal v. Braun*, 53 N. J. L. 617; *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393, *Lorymer v. Smith*, 1 B. & C. 1.

47. *Peckham v. Davis*, 93 Ala. 474; *Flint v. Lyon*, 4 Cal. 17 ("Haxall flour"); *Miller v. Moore*, 83 Ga. 684, 20 Am. St. 329, 6 L. R. A. 374 ("No. 2, white mixed corn, bulk"); *Foos v. Sabin*, 84 Ill. 564 ("fat cattle"); *Timken Co. v. Smith*, 123 Iowa, 554; *Fogg's Adm'r v. Rodgers*, 84 Ky. 558 ("hemp" composed largely of weeds); *Morse v. Moore*, 83 Me. 473, 23 Am. St. 783, 13 L. R. A. 224, *Ingler, Cas. in Sales*, 38 (ice); *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317 ("winter-pressed sperm oil"); *Henshaw v. Robins*, 50 Mass. 83, 43 Am. Dec. 367 ("indigo"); *Hoist Co. v. Johnson*, 114 Mich. 172; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, *Ingler, Cas. in Sales*, 75, 38 N. J. Law. 496 ("early, strap-leaved, red-top turnip seed"); *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13 ("large Bristol cabbage-seed"); *Lewis v. Rountree*, 78 N. Car. 323 ("strained rosin"); *Northwestern Co. v. Rice*, 5 N. Dak. 432, 57 Am. St. 563, ("pure Manila twine"); *Morse v. Union Y'ds*, 21 Oreg. 289, 14 L. R. A. 157 ("beef cattle"); *Borrekins v. Bevan*, 3 Rawle, 23; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280 ("Paris green," not chrome green); *Drew v. Ellison*, 60 Vt. 401; *Hoffman v. Dixon*, 105 Wis. 315, 76 Am. St. 916, ("Rape-seed," not wild mustard seed); *Meyer v. Richards*, 163 U. S. 385; *Chanter v. Hopkins*, 4 M. & W. 399. This sometimes is designated as a warranty. 2 Mechem, Sales, 1149, § 1334.

both sample and description, the goods must be equal to the sample and conform to the description.⁴⁸

§ 172. **Sales—Caveat Emptor.** In the absence of a usage of trade,⁴⁹ there is generally no implied warranty or condition as to the quality⁵⁰ or as to the fitness for any particular purpose, of specific goods open to the inspection of the buyer,⁵¹ where the seller is not the manufacturer nor the grower. *Caveat emptor*⁵²—let the buyer

48. *Gould v. Stein*, 149 Mass. 570, 14 Am. St. 455, 5 L. R. A. 213, *Ingler, Cas. in Sales*, 77; *Nichol v. Godts*, 23 L. J. Exch. 314, 10 Exch. 191; *Uniform Sales Act*, § 14.

49. See *Jones v. Bowden*, 4 Taunt. 347, *Ingler, Cas. in Sales*, 93. *Uniform Sales Act*, § 15 (5).

50. *West v. Cunningham*, 9 Port. 104; *Hunger v. Evans*, 38 Ark. 334; *Johnson v. Powers*, 65 Cal. 181; *Drew v. Roe*, 41 Conn. 41, *Ingler, Cas. in Sales*, 81; *Cogel v. Kniseley*, 89 Ill. 598; *Bowman v. Clemmer*, 50 Ind. 10; *Richardson v. Bouck*, 42 Iowa, 185; *Lukens v. Freilund*, 27 Kans. 664; *Standiford's Adm'r v. Schultz*, 44 Ky. 581; *Warren Co. v. Keystone Co.*, 65 Md. 547; *Downing v. Dearborn*, 77 Me. 457; *Winson v. Lombard*, 35 Mass. 59; *Maxwell v. Lee*, 34 Minn. 511; *Otto v. Alderson*, 18 Miss. 476; *Deming v. Foster*, 42 N. H. 165; *Wolcott v. Mount*, 36 N. J. L. 262, 38 N. J. L. 496, *Pattee, Illus. Cas. in Personalty*, 383; *Day v. Pool*, 52 N. Y. 416; *Hadley v. Clinton Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *Ryan v. Ulmer*, 108 Pa. St. 332; *Bryant v. Pembert*, 45 Vt. 487; *Getty v. Rountree*, 2 Pinn. 379, 2 *Chandl.* 28, 54 Am. Dec. 138; *Slaughter v. Gerson*, 80 U. S. 379; *Harvey v. Young, Yelv.* 21; *Uniform Sales Act*, § 15. See, however, *Thomas v. Sexton*, 15 S. Car. 93.

51. 2 *Mechem, Sales*, 1128, § 1311.

52. *Armstrong v. Buford*, 51 Ala. 410; *National Co. v. Young*, 74 Ark. 144, 109 Am. St. 71; *Moore v. McKinlay*, 5 Cal. 471, *Griffin, Illus. Cas. on Pers. Prop.* 138; *Frazier v. Harvey*, 34 Conn. 469, *Pattee, Illus. Cas. in Personalty*, 365; *Hoffman v. Oates*, 77 Ga. 701; *Kohl v. Lindley*, 39 Ill. 195, 39 Am. Dec. 294; *Burnett v. Hensley*, 118 Iowa, 575; *National Co. v. Rankin*, 68 Kans. 679; *Horner v. Parkhurst*, 71 Md. 110; *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607; *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639, *Ingler, Cas. in Sales*, 92; *McCrays Co. v. Woods*, 99 Mich. 269, 41 Am. St. 599; *Bartlett v. Hopcock*, 34 N. Y. 118, 88 Am. Dec. 428; *Dickson v. Jordan*, 33 N. Car. 166, 53 Am. Dec. 403; *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504; *Hood v. Bloch*, 29 W. Va. 244; *Milwaukee Co. v. Duncan*, 37 Wis. 120, 41 Am. St. 33; *Barnard v. Kellogg*, 77 U. S. 383, 19 L. ed. 987, *Ingler, Cas. in Sales*, 79; *Parkinson v. Lee*, 2 East, 314.

beware—is the Latin maxim; the buyer purchases at his peril. If he wants protection he should insist on the seller's giving an express warranty.¹ Mere inconvenience of examination² or the fact that the defects were latent³ or that the price paid was the value of a sound article,⁴ does not change the rule unless the seller be guilty of fraud.

There are, however, exceptions to this general rule. If the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required⁵ and it appears that the buyer relies on the seller's skill or judgment,⁶ the seller being a dealer in

1. *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276; *Wart v. Hoose*, 119 N. Y. Supp. 1107. If the buyer has an express warranty he is not bound to make any examination of the goods. *Adams Co. v. Turner*, (Ala.) 50 So. 308.

2. 2 *Mechem, Sales*, 1129, § 1312.

3. 2 *Mechem, Sales*, 1131, § 1316; *Jones v. Just*, L. R. 3 Q. B. 197.

4. 2 *Mechem, Sales*, 1134, § 1319; *Dean v. Mason*, 4 Conn. 428, 10 Am. Dec. 162; *Johnston v. Cope*, 3 Harr. & J. 89, 5 Am. Dec. 423; *Moses v. Mead*, 1 Den. 378, 43 Am. Dec. 676. *Contra*: *Bulwinkle v. Cramer*, 27 S. Car. 376, 13 Am. St. 645, where it is said that a "sound price requires sound property."

5. *Englehardt v. Clanton*, 83 Ala. 336; *Rhodesia Co. v. Tombacher*, 129 N. Y. Supp. 420; *Gillespie v. Cheney*, 2 Q. B. 59, 65 L. J. Q. B. 552.

6. 2 *Mechem, Sales*, 1160, § 1344; *Troy Co. v. Potter*, 139 Ala. 359; *Weed v. Dyer*, 53 Ark. 155; *Fox v. Harvester W'ks*, 83 Cal. 333; *Pacific W'ks v. Newhall*, 34 Conn. 67; *Smith v. Hightower*, 76 Ga. 629; *Edwards v. Dillon*, 147 Ill. 14, 37 Am. St. 199; *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; *Ideal Co. v. Kramer*, 127 Iowa, 137; *Shaw v. Smith*, 45 Kans. 334, 11 L. R. A. 681, *Pattee, Illus. Cas. in Personalty*, 375; *Gardner v. Winter*, 117 Ky. 382, 63 L. R. A. 647; *Downing v. Dearborn*, 77 Me. 457; *Queen Co. v. Clay Co.*, 97 Md. 429; *Hight v. Bacon*, 126 Mass. 10, 80 Am. Rep. 639, *Ingler, Cas. in Sales*, 92; *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327; *Pattee, Illus. Cas. in Personalty*, 370, *Griffin, Illus. Cas. in Pers. Prop.* 139; *Breen v. Moran*, 51 Minn. 525; *Armstrong v. Johnson Co.*, 41 Mo. App. 254; *Omaha Co. v. Fay*, 37 Nebr. 68; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Thomas v. Simpson*, 80 N. Car. 4; *Byers v. Chapin*, 28 Ohio St. 300; *Coyle v. Baum*, 3 Okla. 695; *Morse v. Union Y'da*, 21 Oreg. 239, 14 L. R. A. 157; *Port C. Co. v. Groves*, 68 Pa. St. 149; *Robson v.*

such goods, there is an implied condition that the goods shall be reasonably fit for the purpose unless an article is bought under its patent or other trade name.⁷ If the seller is a manufacturer or grower of the article sold, there is an implied warranty against latent defects unknown to the buyer,⁸ arising during the manufacture⁹ or growth; as the manufacturer holds himself out as competent and is presumed to understand the process.¹⁰

Miller, 12 S. Car. 586; Overton v. Phelan, 39 Tenn. 445; Harris v. Waite, 51 Vt. 480, 31 Am. Rep. 694; Gerst v. Jones, 73 Va. (32 Gratt.) 518; Tacoma Co. v. Bradley, 2 Wash. 600; Woodie v. Whitney, 23 Wis. 55, 99 Am. Dec. 102; Kellogg Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86; Bigelow v. Baxall, 38 Up. Can. Q. B. 452; Jones v. Just, L. R. 3 Q. B. 197, 37 L. J. Q. B. 39; Uniform Sales Act, § 15 (1).

If the seller disclaims knowledge of the fitness of the article, of course there is no implied warranty. Englehardt v. Clanton, 83 Ala. 336; Young v. Plattner Co., 41 Colo. 65; Gage v. Carpenter, 107 Fed. 886, 47 C. C. A. 39.

7. Gachet v. Warren, 72 Ala. 288; Moultrie v. Schofield, (Ga.) 65 S. E. 315; Peoria Co. v. Turney, 175 Ill. 631; Diebold Co. v. Huston, 55 Kans. 104; Warren Co. v. Coal Co., 65 Md. 547; Day v. Construction Co., 174 Mass. 412; McCray Co. v. Woods, 99 Mich. 269, 41 Am. St. 599; Wisconsin Co. v. Hood, 54 Minn. 543, 60 Minn. 401, 51 Am. St. 539, 67 Minn. 329, 64 Am. St. 418; Gregg v. Belting Co., 69 N. H. 247; Ivans v. Laury, 67 N. J. L. 153; Dounce v. Dow, 64 N. Y. 411; Dickson v. Jordan, 33 N. Car. 166; Cleveland Wks v. Carbon Co., 75 Ohio St. 153; American Co. v. Trust Co., 210 Pa. St. 320; Beggs v. Brewing Co., 27 R. I. 385; Mason v. Chappell, 56 Va. (15 Gratt.) 572; Milwaukee Co. v. Duncan, 87 Wis. 120, 41 Am. St. 33; Seitz v. Brewers' Co., 141 U. S. 510, 35 L. ed. 837, Ingler, Cas. in Sales, 87; Chanter v. Hopkins, 4 M. & W. 399; Uniform Sales Act, § 15 (4).

8. 2 Mechem, Sales, 1164, § 1346; Moore v. Koger, 113 Mo. App. 423; Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290; Randall v. Newson, 2 Q. B. D. 102.

9. 2 Mechem, Sales, 1132, § 1317; Hoult v. Baldwin, 67 Cal. 610; Chicago Co. v. Tilton, 87 Ill. 547; Mann v. Everston, 32 Ind. 355; McKinnon Co. v. Fish Co., 103 Mich. 221; Wisconsin Co. v. Hood, 60 Minn. 401, 51 Am. St. 539; Bierman v. City Co., 151 N. Y. 432, Ingler, Cas. in Sales, 90; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Tennessee Co. v. Leeds, 97 Tenn. 574; Pease v. Sabin, 33 Vt. 432, 91 Am. Dec. 364, Pattee, Illus. Cas. in Personality, 373; Leopold v. Van Kirk, 27 Wis. 152; Nashua Co. v. Brush, 91 Fed. 213, 33 C. C. A. 456, 50 U. S. App. 461; Mody v. Gregson, L. R. 4 Exch. 49.

10. 2 Mechem, Sales, 1133, § 1318; Drummond v. Van Ingen, 12 A. C. 234.

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If goods are bought by description from a seller who deals in goods of that description, and the buyer does not have an opportunity for examining them, there is an implied condition that the goods are merchantable,¹¹ that is, salable in the market at the ordinary price,¹² unless the seller is a known dealer in second-hand goods. However, to be merchantable it is not requisite that the goods shall be the very best.¹³

11. 2 Mechem, Sales, 1157, § 1340; Bunch v. Weil, 72 Ark. 343, 65 L. R. A. 80; Blackwood v. Packing Co., 76 Cal. 212, 9 Am. St. 199; Wilcox v. Owens, 64 Ga. 601; Babcock v. Trice, 18 Ill. 420, Pattee, Illus. Cas. in Personalty, 379; McClung v. Kelley, 21 Iowa, 508; Bigger v. Bovard, 20 Kans. 204; Campion v. Marston, 99 Me. 410; Murchie v. Cornell, 155 Mass. 60, 31 Am. St. 526, 14 L. R. A. 492; Grieb v. Cole, 60 Mich. 397; Fitch v. Archibald, 29 N. J. L. 160; Hamilton v. Ganyard, 34 Barb. 204; Cullen v. Bimm, 37 Ohio St. 236; Fogel v. Brubaker, 122 Pa. St. 7; Brantly v. Thomas, 22 Tex. 270; Brown v. Sayles, 27 Vt. 227; Hood v. Bloch, 29 W. Va. 244; Merriam v. Field, 39 Wis. 578; English v. Commission Co., 57 Fed. 451, 6 C. C. A. 416; Gardiner v. Gray, 4 Camb. 144; Uniform Sales Act, § 15 (2).

However, the seller does not warrant impliedly that the goods will continue merchantable. Bill v. Fuller, 146 Cal. 50; Lord v. Edwards, 148 Mass. 476. Hence, if goods are to be shipped to the buyer and the ownership passes to the buyer upon delivery to the carrier, the buyer takes the risk of any deterioration necessarily incident to the transit. Gates v. Pkg. Co., 78 Cal. 439; Leggat v. Brewing Co., 60 Ill. 158; Mann v. Everston, 32 Ind. 355; Jones v. Bloomgarden, 143 Mich. 326; Mobile Co. v. McGuire, 81 Minn. 232; McHenry v. Bulfant, 207 Pa. St. 15; English v. Spokane Co., 57 Fed. 451, 6 C. C. A. 416; Bull v. Robinson, 10 Exch. 342, 24 L. J. Exch. 165.

12. Howard v. Hoey, 23 Wend. 350, 35 Am. Dec. 572; Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290; Wieler v. Schlizzi, 17 Cl. B. 619. "The article shall not have any remarkable defect." McClung v. Kelley, 21 Iowa, 508.

13. Wilson v. Lawrence, 139 Mass. 318. It is not easy to define "merchantable" as here used. It is clear that the contract will not be performed by the delivery of the worst goods in the market. 2 Mechem, Sales, 1158, § 1341. Goods might be merchantable and yet not be fit for all purposes. Jones v. Padgett, 24 Q. B. D. 650. Thus, flour, though unsuitable for starch, might be useful for many other purposes. Hart v. Wright, 17 Wend. 267. The warranty must receive a reasonable construction. While the buyer of six apples might have reason to complain if one of them was decayed, it would be otherwise

§ 173. Sales—Exclusion of Implied Warranties. An implied warranty or condition is negated by an express warranty or condition which is inconsistent;¹⁴ but if not inconsistent¹⁵ each will be given effect. Thus an express warranty of quality would not exclude the implied warranty of title.¹⁶

§ 174. Sales—Transfer of Ownership—Ascertained Goods. One important point in a sale is the exact time when the ownership passes from the seller to the buyer, becoming quite important in event of damage to, or destruction of, the goods,¹⁷ or of a subsequent increase in

If a barrel of apples were purchased and but one was decayed. See *Cullen v. Bimm*, 37 Ohio St. 236.

14. 2 *Mechem, Sales*, 1095, § 1259; *Barnes v. Blair*, 16 Ala. 71; *Kullman v. Sugar Co.*, 153 Cal. 725; *Moultrie Co. v. Hill*, 120 Ga. 730; *White v. Gresham*, 52 Ill. App. 399; *Reeves v. Byers*, 155 Ind. 535; *Bucy v. Pitts Wks.*, 89 Iowa, 464; *Coffman v. Allin*, 16 Ky. 200; *Whitmore v. Iron Co.*, 84 Mass. 52; *McGraw v. Fletcher*, 35 Mich. 104; *Cosgrove v. Bennett*, 32 Minn. 371; *Wood Co. v. Bobbst*, 56 Mo. App. 427; *Smith v. Evans*, 13 Nebr. 314; *Deming v. Foster*, 42 N. H. 165; *Carleton v. Lombard*, (N. Y.) 72 Hun, 254; *Dowagiac Co. v. Mahon*, 13 N. Dak. 516; *Stucky v. Clyburn*, Cheves, 186, 34 Am. Dec. 590; *Wasatch Co. v. Morgan Co.*, 32 Utah, 229; *Milwaukee Co. v. Duncan*, 87 Wis. 120, 41 Am. St. 33; *De Witt v. Berry*, 184 U. S. 306, 83 L. ed. 396; *Dickson v. Zizinia*, 10 C. B. 602, 20 L. J. C. P. 73. The Latin maxim applying here is, *Expressum facit cessare tacitum* (that which is expressed makes that which is implied to cease) *Kinney, Law Dict.*, 302.

15. *Elgin Co. v. Estes*, 122 Ga. 807; *Ideal Co. v. Kramer*, 127 Iowa, 137; *Castellano v. Peillon*, 14 La. (2 Mart. N. S.) 466; *Buick Co. v. Reid Co.*, 150 Mich. 118; *Aultman v. Hunter*, 82 Mo. App. 632; *Cooper v. Payne*, (N. Y.) 103 App. Div. 118; *Hooven Co. v. Wirtz*, 15 N. Dak. 477; *Houston v. Gilbert*, 8 Brev. 63, 5 Am. Dec. 542; *Boothby v. Scales*, 27 Wis. 626; *Bigge v. Parkinson*, 31 L. J. Exch. 301; 7 L. T. Rep. N. S. 92, 7 H. & N. 955, 8 Jur. N. S. 1014, 10 Wkly. Rep. 349; *Uniform Sales Act*, § 15 (6).

16. *Langley v. Auld*, 5 N. Car. 138, 3 Am. Dec. 680.

17. If the ownership has not passed, the risk of damage or loss rests on the seller; *Glisson v. Heygle*, 105 Ga. 30; *Quaker Co. v. Tucker*, 134 Ill. App. 547; *Allyn v. Burns*, 37 Ind. App. 223; *Hunt v. Wyman*, 100 Mass. 198, *Pattee*, Illus. Cas. in *Personalty*, 323; *Zwiesler v. Storta*, 30 Me. App. 163; *Brock v. O'Donnell*, 45 N. J. L. 441;

value,¹⁸ or in event of the creditors of either of the parties seeking to attach or to levy upon the goods;¹⁹ or in determining who is responsible for the taxes thereon,²⁰ or in fixing the rights of sub-buyers,²¹ or in determining the form of action to be brought on the contract.²² It is a question of the intention²³ of the parties when

Joyce v. Adams, 3 N. Y. 391; *McCandlish v. Newman*, 22 Pa. St. 460; *Elphick v. Barnes*, 5 C. P. D. 321; but if the ownership has passed, the risk is on the buyer. *Foley v. Feirath*, 98 Ala. 176, 39 Am. St. 39; *Wade v. Moffet*, 21 Ill. 110, *Ingler, Cas. in Sales*, 181; *Bertelson v. Bower*, 81 Ind. 512; *Sweeney v. Owsley*, 53 Ky. 413; *Wing v. Clark*, 24 Me. 366, 372; *Townsend v. Hargraves*, 118 Mass. 325; *Whitcomb v. Whitney*, 24 Mich. 486, *Ingler, Cas. in Sales*, 110; *Strauss Co. v. Kingman*, 42 Mo. App. 208; *Clark v. Greeley*, 62 N. H. 394; *Terry v. Wheeler*, 25 N. Y. 520, *Ingler, Cas. in Sales*, 108, *Pattee, Illus. Cas. in Personalty*, 349; *Ruthrauff v. Hagenbuch*, 58 Pa. St. 103; *Leonard v. Davis*, 66 U. S. 476, 17 L. ed. 222; *Tarling v. Baxter*, 6 B. & C. 360. The Latin maxim is, *Res perit domino* (a thing is lost to the owner). The parties can agree as to the risk regardless of the ownership; *Cushman v. Holyoke*, 34 Me. 289; *Castle v. Playford*, L. R. 7 Exch. 98; and if the transfer of ownership is delayed through the fault of either party, the risk should be borne by him. *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Uniform Sales Act*, § 22 (b). The question might be important, after a loss, as to the right to collect insurance money.

18. *Groat v. Gile*, 51 N. Y. 431.

19. *Donnelly v. Mitchell*, 119 Iowa, 432; *Brewer v. Smith*, 3 Me. 44; *Weld v. Cutler*, 68 Mass. 195; *Smart v. Batchelder*, 51 N. H. 140; *Hurff v. Hires*, 39 N. J. L. 4, 40 N. J. L. 581; *Comfort v. Kiersted*, 26 Barb. 472; *Dando v. Foulds*, 105 Pa. St. 74; *Hall Co. v. Brown*, 82 Tex. 469; *Hale v. Huntley*, 21 Vt. 147; *Fosdick v. Schall*, 99 U. S. 235; *Hanson v. Meyer*, 6 East, 614. If the ownership is in the buyer, his creditors can seize the goods; *Hotchkiss v. Higgins*, 52 Conn. 205, 52 Am. Rep. 582; *Martin v. Adams*, 104 Mass. 262; otherwise not. *Wells v. McNerney*, 74 Conn. 675.

20. *Sherwin v. Mudge*, 127 Mass. 547, *Ingler, Cas. in Sales*, 5.

21. If the ownership has passed to the buyer he can give a sub-buyer title to the goods. *O'Donnell v. Wing*, 121 Ga. 717; *Dearborn v. Turner*, 16 Me. 17, 33 Am. Dec. 630, *Pattee, Illus. Cas. in Personalty*, 276; *McKinney v. Bradlee*, 117 Mass. 321; *Kirkham v. Attenborough*, [1897] 1 Q. B. 201.

22. *Zwisler v. Storts*, 30 Mo. App. 163; *Chinery v. Viall*, 5 H. & N. 288; 1 *Mechem, Sales*, 392, § 476.

23. 1 *Mechem, Sales*, 392, § 477; *Kost v. Reilly*, 62 Conn. 57; *Foster v. Magill*, 119 Ill. 75; *O'Farrel v. McClure*, 5 Kans. App. 380;

the buyer is to become the owner, but it is seldom that they state their intention in advance, the question generally arising unexpectedly; and, in case of dispute after the point has become important, the law has laid down rules deduced from the circumstances,²⁴ for determining the intention. Much depends on the point whether the goods are ascertained or not.²⁵ Specific or Ascertained goods are certain definite articles which both parties have in mind when making the contract and the seller could not perform his contract by tendering other goods though exactly like the goods bargained for; but if the parties have in mind goods of a certain kind only without reference to any definite articles, so that the seller could deliver any goods of the kind mentioned in the contract, such goods are known as Unascertained or Future goods. Thus a contract for the sale of "this watch" has reference to some particular article. It is ascertained, and the buyer could not be compelled to take any other watch, though just like it. If, however, the contract was in regard to a "watch like this," it relates to unascertained goods, and there might be a number of watches exactly alike, any one of which could be tendered by the seller in performance of his contract. If,

Sherwin v. Mudge, 127 Mass. 547, *Ingler, Cas. in Sales*, 5; *Hovey v. Gow*, 81 Mich. 314; *Wheless v. Meyer Co.*, (Miss.) 120 S. W. 708; *Kerr v. Henderson*, 62 N. J. L. 724; *Terry v. Wheeler*, 25 N. Y. 520, *Pattee, Illus. Cas. in Personalty*, 349, *Ingler, Cas. in Sales*, 108; *Kent Co. v. Norbeck*, 150 Pa. St. 559; *State v. Wharton*, 117 Wis. 558; *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554, *Pattee, Illus. Cas. in Personalty*, 249, *Ingler, Cas. in Sales*, 3; *Shepherd v. Harrison*, L. R. 5 H. L. 116, *Uniform Sales Act*, § 18 (1).

24. 1 *Mechem, Sales*, 412, § 499; *Vehmeyer v. Earl*, 22 Ill. App. 522; *Branigan v. Hendrickson*, 17 Ind. App. 198; *Foster v. Ropes*, 111 Mass. 10; *Byles v. Collier*, 54 Mich. 1; *Day v. Gravel*, 72 Minn. 159; *Towne v. Davis*, 66 N. H. 396; *Cornell v. Clark*, 104 N. Y. 451; *Wadhams v. Balfour*, 32 Ore. 313; *Winslow v. Leonard*, 24 Pa. St. 14; *Pacific Co. v. Rudebeck*, 15 Wash. 336; *Hood v. Bloch*, 29 W. Va. 244; *State v. Wharton*, 117 Wis. 558; *Clarkson v. Stevens*, 106 U. S. 505, 27 L. ed. 139. *Uniform Sales Act*, § 18 (2).

25. 1 *Mechem, Sales*, 393, § 430.

after negotiations in either of these cases one of the parties should become bankrupt, it would make a difference whether the other had a watch or merely a claim for damages for breach of contract. If the transaction involved a large quantity, the financial difference might be considerable.

Generally, the ownership of *specific* goods in a deliverable state passes to the buyer when the contract is made,²⁶ provided the contract is not conditional; and this results even though the price has not been paid²⁷ nor the goods delivered.²⁸ In cases where it is evident that a cash transaction is intended²⁹ and the ownership is not to pass until payment, as would be the case in bargains between strangers, payment would be necessary to

26. 1 Mechem, Sales, 396, § 483; *Pilgreen v. State*, 71 Ala. 370; *Wade v. Moffett*, 21 Ill. 110, 74 Am. Dec. 79, *Ingler, Cas. in Sales*, 181; *Bertelsen v. Bower*, 81 Ind. 514; *Folsom v. Cornell*, 150 Mass. 115; *Lansing v. Turner*, 2 Johns. 13, *Ingler, Cas. in Sales*, 136; *Croft v. Jennings*, 173 Pa. St. 216; *Poling v. Flanagan*, 41 W. Va. 191; *Arkansas Co. v. Mann*, 180 U. S. 69; *Dixon v. Yates*, 5 B. & Ad. 313.

27. 1 Mechem, Sales, 405, § 493; *Rail v. Little Co.*, 47 Minn. 422; *Olyphant v. Baker*, 5 Den. 379; *Tarling v. Baxter*, 6 B. & C. 360, *Ingler, Cas. in Sales*, 113; *Uniform Sales Act*, § 19 (1).

28. 1 Mechem, Sales, 398, § 485; *Montgomery Co. v. Hardaway*, 104 Ala. 100; *Donley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242; *Crill v. Doyle*, 53 Cal. 713; *England v. Forbes*, 7 Houst. 301; *Webster v. Granger*, 78 Ill. 230; *Clinton B'k v. Studemann*, 74 Iowa, 104; *Kneeland v. Renner*, 2 Kans. App. 451; *Sweeney v. Owsley*, 53 Ky. 413; *Taylor v. Twenty-five Bales*, 77 La. (26 La. Ann.) 247; *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87; *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303; *Philbrook v. Eaton*, 134 Mass. 398; *Byles v. Collier*, 54 Mich. 1; *Cassell v. Backrack*, 42 Miss. 56, 2 Am. Rep. 590, 97 Am. Dec. 436; *Woodburn v. Cogdal*, 39 Mo. 222; *Uhl v. Robison*, 8 Nebr. 272; *Bailey v. Smith*, 43 N. H. 143; *Frazier v. Fredricks*, 24 N. J. L. 162; *Russell v. Carrington*, 42 N. Y. 119, 1 Am. Rep. 502; *Albemarle Co. v. Wilcox*, 105 N. Car. 34; *Fletcher v. Nelson*, 6 N. Dak. 94; *Hooben v. Bidwell*, 16 Ohio St. 509, 47 Am. Dec. 386; *Potter v. Coward*, 19 Tenn. 26; *Scarbrough v. Alcorn*, 74 Tex. 358; *Briggs v. U. S.*, 143 U. S. 346.

29. 1 Mechem, Sales, 447, § 538; *Bergan v. Magnus*, 98 Ga. 514; *Clark v. Greeley*, 62 N. H. 394; *Turner v. Moore*, 58 Vt. 455; *Copland v. Bosquet*, 4 Wash. 538, Fed. Cas. No. 3,212.

the passing of the ownership; but generally the instant the minds of the parties have met, the ownership of the goods passes to the buyer, the seller at once having a right to the price;³⁰ and this is so even though the article sold may not be present.³¹ Transfer of ownership, payment of the price, and delivery of the goods are entirely independent of each other. Thus if the buyer should say, "How much is the watch?" and the seller replies, "Fifty dollars," and the buyer responds, "All right, I'll take it," the ownership passes instantly to the buyer, and the seller becomes entitled to the price; and this result follows even though the watch might remain in the possession of the seller for a long time afterwards, or the watch for some time previously might have been in the possession of the buyer. Likewise it is immaterial when the price is paid, unless, as before stated, the circumstances indicate that the parties intended a cash transaction.³²

If the seller is to do something in regard to the goods in order to put them into a deliverable state,³³ or he is

30. *Phillips v. Moor*, 71 Me. 73, *Pattee, Illus. Cas. in Personalty*, 260; *Raff v. Little Co.*, 47 Minn. 422; *Hayden v. Demets*, 53 N. Y. 426.

31. *Erwin v. Arthur*, 61 Mo. 336.

32. 1 *Mechem, Sales*, 403, § 494.

33. 1 *Mechem, Sales*, 422, § 507; *Screws v. Roach*, 22 Ala. 675 (cotton to be gathered and ginned); *Deutsch v. Dunham*, 72 Ark. 141, 105 Am. St. 21 (timber to be sawed and piled); *Orient Co. v. McKnight*, 96 Ill. App. 525, *aff'd* 197 Ill. 190 (corn to be shelled); *Lester v. East*, 49 Ind. 538 (hogs to be fattened); *Caywood v. Timmons*, 31 Kans. 394 (wheat to be threshed); *Jennings v. Flannagan*, 35 Ky. 217, 30 Am. Dec. 633; *Wesoloski v. Wysocki*, 136 Mass. 495 (onions to be screened); *Day v. Gravel*, 72 Minn. 159; *Smith v. Sparkman*, 55 Miss. 649, 30 Am. Rep. 537 (cotton to be ginned and baled); *Groff v. Belche*, 62 Mo. 400 (oats to be threshed); *Thompson v. Conover*, 32 N. J. L. 466 (grain to be threshed); *Halterline v. Rice*, 62 Barb. 593 (cutter to be completed); *Allman v. Davis*, 24 N. Car. 12 (wagon to be altered); *Backhaus v. Buells*, 43 Oreg. 558; *Pritchett v. Jones*, 4 Rawle, 260; *Bond v. Greenwald*, 60 Tenn. (4 Heisk.) 453 (cotton to be ginned and baled); *Kitson Co. v. Holden*, 74 Vt. 104 (machines to be put up in running order); *North Co. v. Kerron*, 5 Wash. 214; *Elgee Cas.* 89 U. S. 180; *Rugg v. Minett*, 11 East, 210, *Ingier, Cas. in Sales*, 114; *Uniform Sales Act*, § 19, Rule 2.

to measure, to weigh, or to test them,³⁴ the ownership does not pass to the buyer until the seller has done these things, unless a contrary intention appears.³⁵ Goods are in a deliverable state when the buyer would be bound to accept them in the condition in which they are.³⁶

Delivery of the goods to the buyer is very strong evidence that the ownership has passed to him³⁷ even though the goods are to be weighed or measured by the buyer;³⁸ but it is not conclu-

Unless otherwise agreed, the expense of putting the goods into a deliverable state must be borne by the seller. *Cole v. Kerr*, 20 Vt. 21, *Ingler, Cas. in Sales*, 156.

34. 1 *Mechem, Sales*, 421, § 504; *Mobile B'k v. Fry*, 69 Ala. 348; *Jones v. Pearce*, 25 Ark. 545; *Home Co. v. Heck*, 65 Ill. 111; *Commercial B'k v. Gillette*, 90 Ind. 268, 46 Am. Rep. 223; *Tingle v. Kelly*, 29 Ky. Law Rep. 24; *Abat v. Atkinson*, 72 La. (21 La. Ann.) 414; *Sherwin v. Mudge*, 127 Mass. 547, *Ingler, Cas. in Sales*, 5; *Tyler Co. v. Charlton*, 128 Mich. 299, 8 Detroit Leg. N. 651, 55 L. R. A. 301; *Restad v. Engemoen*, 65 Minn. 148; *Smart v. Batchelder*, 57 N. H. 140; *Kein v. Tupper*, 52 N. Y. 550; *Hamilton v. Gordon*, 22 Oreg. 577; *Nicholson v. Taylor*, 31 Pa. St. 128, 72 Am. Dec. 728; *Smith v. Evans*, 36 S. Car. 69; *Gibbs v. Benjamin*, 45 Vt. 124; *Pacific Co. v. Bravinder*, 14 Wash. 315; *Bank of Huntington v. Napier*, 41 W. Va. 481; *Galloway v. Week*, 54 Wis. 604; *Hays v. Pittsburgh Co.*, 33 Fed. 552; *Wilson v. Shaver*, 1 Ont. Law Rep. 107; *Hanson v. Meyer*, 6 East, 614, *Ingler, Cas. in Sales*, 115.

35. 1 *Mechem, Sales*, 424, § 509; *Straus v. Minzesheimer*, 78 Ill. 492; *Martz v. Putnam*, 117 Ind. 392; *Barber v. Thomas*, 66 Kans. 463; *Paine v. Young*, 56 Md. 314; *Riddle v. Varnum*, 37 Mass. 280; *Kelsea v. Haines*, 41 N. H. 246; *Butterworth v. McKinly*, 80 Tenn. 206; *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554, *Pattee, Illus. Cas. in Personalty*, 249, *Ingler, Cas. in Sales*, 3; *Young v. Matthews*, L. R. 2 C. P. 127.

36. Uniform Sales Act, § 76 (4). That is, they comply with the terms of the contract.

37. 1 *Mechem, Sales*, 438, § 525.

38. *Francis Co. v. Gray*, 104 Ala. 236; *King v. Jarman*, 35 Ark. 190, 197, 37 Am. Rep. 11; *Upson v. Holmes*, 51 Conn. 500; *Foster v. Magill*, 119 Ill. 75, *Ingler, Cas. in Sales*, 26; *Sedgwick v. Cottingham*, 54 Iowa, 512, *Pattee, Illus. Cas. in Personalty*, 272; *Farmers' Co. v. Gill*, 69 Md. 537; *Cushman v. Holyoke*, 34 Me. 289; *Odell v. Railroad Co.*, 109 Mass. 50; *Van Wert v. Grocer Co.*, 100 Mich. 328; *Ober v. Carson*, 62 Mo. 209; *Kelsea v. Haines*, 41 N. H. 246;

sive.³⁹ If, however, the goods are delivered to the buyer for the mere purpose of inspection by him, delivery alone would not indicate an intention to transfer ownership.⁴⁰ If goods are delivered to the buyer on approval, the ownership does not pass to him until he signifies his approval; and such approval may be in express terms or it may be implied by his dealing with the goods as owner, as by reselling them or refusing to surrender them,⁴¹ or by his retention of the goods beyond the time fixed, or for an unreasonable time in the absence of a definite time being designated.⁴² If the buyer expressly rejects the goods, he is not under any obligation to return them to the seller unless he has agreed to do so.⁴³

§ 175. Sales—Transfer of Ownership—Unascertained Goods. In a sale of unascertained goods the ownership of any particular articles does not pass to the buyer⁴⁴

Boswell v. Green, 25 N. J. L. 290; *Burrows v. Whitaker*, 71 N. Y. 291; *Wadhams v. Balfour*, 32 Oreg. 313; *Scott v. Wells*, 6 Watts & S. 357, 40 Am. Dec. 568; *Baldwin v. Doubleday*, 59 Vt. 7; *Haxall v. Willis*, 56 Va. (15 Gratt.) 434; *Gill v. Benjamin*, 64 Wis. 362, 54 Am. Rep. 619; *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554, *Pattee*, illus. Cas. in Personalty, 249, *Inglar*, Cas. in Sales, 3.

39. *Ballentyne v. Appleton*, 82 Me. 570, 573; *Wilkinson v. Holiday*, 33 Mich. 386. As would be the case where the sale was for cash on delivery. 1 *Mechem*, Sales, 464, § 561.

40. *Home Co. v. Heck*, 65 Ill. 111; *Cole v. Bryant*, 73 Miss. 297; *Cornell v. Clark*, 104 N. Y. 451; *Rosenthal v. Kahn*, 19 Oreg. 571.

41. *Jones v. Wright*, 71 Ill. 61; *Frey Co. v. Brick Co.*, 104 Iowa, 494; *Delamater v. Chappell*, 48 Md. 244; *Hickman v. Shimp*, 109 Pa. St. 16.

42. *Osborn v. Stanley*, 35 Ill. 102; *Spickler v. Marsh Bros.*, 36 Md. 222; *Machine Co. v. Mengel*, 99 Mich. 280; *Rohn v. Dennis*, 109 Pa. St. 505; *Fintel v. Cook*, 88 Wis. 485.

43. *McCormick Co. v. Cochran*, 64 Mich. 636; *McCormick Co. v. Chesrown*, 33 Minn. 32; *Exhaust Co. v. Railway Co.*, 69 Wis. 454.

44. *Fry v. Mobile B'k*, 75 Ala. 473; *Upham v. Dodd*, 24 Ark. 545; *Caruthers v. McGarvey*, 41 Cal. 15; *Shaw v. Smith*, 48 Conn. 306, 40 Am. Rep. 170; *Hall v. Green*, 1 Houst. 546; *Huntington v. Chisholm*, 61 Ga. 270; *Wollensak v. Briggs*, 119 Ill. 453; *Fordice v. Gibson*, 129 Ind. 7; *Moline Co. v. Beed*, 52 Iowa, 307, 35 Am. Rep.

until the goods have been ascertained or individualized, unless it is the sale of an undivided part with the intention that the parties shall own the subject-matter in common.⁴⁵ Unascertained goods become ascertained when they are "appropriated to the contract." Appropriation to the contract means the selection by both⁴⁶ parties of the particular goods which are to be the subject of the contract. Thus if the buyer were to walk into a furniture store, and, pointing to a chair, should say to the proprietor, "I want ten chairs like that," and then and there should pay for ten chairs, the ownership of ten particular chairs would not pass to the buyer, even though the seller might happen to have but ten chairs of that description in stock. If, in the meantime, the store and its contents should burn, the loss of the chairs there-

272; *Howell v. Pugh*, 27 Kans. 702; *Ferguson v. Northern B'k*, 77 Ky. 555; *Witt Co. v. Seegars*, 110 La. 547; *Morrison v. Dingley*, 63 Me. 553; *New Eng. Co. v. Worsted Co.*, 165 Mass. 329; *Black v. Herbert*, 111 Mich. 638; *Baldwin v. McKay*, 41 Miss. 358; *Ober v. Carson*, 62 Mo. 213, 6 Mo. App. 598, 9 Mo. App. 578; *Bailey v. Smith*, 43 N. H. 141; *Randolph Co. v. Elliott*, 34 N. J. L. 184; *Higgins v. Murray*, 4 Hun, 565, 73 N. Y. 252; *Waldo v. Belcher*, 33 N. Car. 609; *Ormsby v. Machlin*, 20 Ohio St. 295; *Derbyshire's Est.*, 81 Pa. St. 18; *Fitzpatrick v. Fain*, 43 Tenn. 15; *Tufts v. Lawrence*, 77 Tex. 526; *Clarkson v. Stevens*, 106 U. S. 505; *McDougall v. Elliott*, 20 Up. Can. Q. B. 299; *Wallace v. Breeds*, 13 East, 522.

45. *Chapman v. Shepard*, 39 Conn. 413; *Watts v. Hendry*, 13 Fla. 523; *Phillips v. Ocmulgee Mills*, 55 Ga. 634; *Cloke v. Shafroth*, 137 Ill. 393; *Kingman v. Holmquist*, 36 Kans. 735; *Waldron v. Chase*, 37 Me. 414; *Damon v. Osborn*, 18 Mass. 476; *Iron Co. v. Buhl*, 42 Mich. 86; *Mackellar v. Pillsbury*, 48 Minn. 396; *Hurff v. Hires*, 40 N. J. L. 581; *Russell v. Carrington*, 42 N. Y. 118; *Brownfield v. Johnson*, 128 Pa. St. 267; *Young v. Miles*, 20 Wis. 615; *Whitehouse v. Frost*, 12 East. 614.

In some states the buyer does not obtain title to a quantity of a larger mass until that part has been identified. *Ferguson v. Northern Bank*, 77 Ky. 555.

46. 1 *Mechem, Sales*, 600, § 729; *Home Co. v. Heck*, 65 Ill. 111; *Tufts v. Grewer*, 83 Me. 407; *Reeder v. Machen*, 57 Md. 56; *Andrews v. Cheney*, 62 N. H. 404, *Ingler, Cas. in Sales*, 121; *Hague v. Porter* (N. Y.), 3 Hill, 141; *Rider v. Kelley*, 32 Vt. 263; *American Co. v. Chalkley*, 101 Va. 458; *Godts v. Rose*, 17 C. B. 229; *Uniform Sales Act*, § 19, Rule 4 (1).

in would fall upon the seller, as the chairs are his and not the buyer's; or if the seller should become bankrupt, the buyer would not have a right to demand any particular chairs but merely would have a claim for the price paid by him and would have to share in the general assets as any other creditor. The seller could transfer to others all of the chairs he had on hand when the contract was made, and would still perform his contract with the buyer by the delivery of ten chairs of the desired kind by the time agreed upon; but as soon as the seller has set out ten chairs which are of the kind the buyer desires and the buyer has assented to the selection of these particular ten chairs, the ownership of these specific ten chairs would pass to the buyer; and this specification is what is meant by appropriation to the contract. Upon appropriation to the contract all of the risks attendant upon ownership instantly pass from the seller to the buyer unless these parties expressly agreed otherwise.

In making the appropriation, one of the parties can, and very frequently does, act as agent for the other;⁴⁷ as, in the illustration used above, the buyer might request the seller to send the chairs to the buyer's house, and the appropriation would be complete as soon as the chairs were sent, although the buyer has not seen them, provided, of course, the chairs are such as the buyer ordered and are in a deliverable state; or, when the contract was made, the seller might ask the buyer to select his ten chairs and to take them away, in which case the buyer would be acting as the agent of the seller in making the appropriation.

Authority to the seller to act as agent for the buyer in making the appropriation frequently is implied;⁴⁸

47. *Aldridge v. Johnson*, 7 R. & B. 335.

48. *Armstrong v. Turner*, 49 Md. 539; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *McIntyre v. Kline*, 30 Miss. 361; *Balentine v. Robinson*, 46 Pa. St. 179; *Spicers v. Harvey*, 9 R. I. 532; *Robde v. Thwaites*, 6 B. & C. 332.

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usually must be where the buyer is at a distance and
sends goods by mail or by telegraph.⁴⁹ Thus a country
merchant ordering goods from a wholesale house neces-
sarily must leave the selection to the seller, and the ap-
propriation becomes complete when the goods are in the
possession of the carrier for transmission to the buyer.¹
So if the buyer sends receptacles² for the goods, such as
sacks³ to be filled by the seller, there is implied author-
ity to the seller to make the appropriation.

§ 176. **Sales without Title.** The general rule is that
the buyer of goods does not take any better title to them
than the seller had.⁴ Thus a purchaser from one who
found an article does not acquire any greater right there-

49. *Smith v. Edwards*, 156 Mass. 221.

1. *Herron v. State*, 51 Ark. 133; *Falvey v. Richmond*, 37 Ga. 99;
Lake Co. v. Bank, 178 Ill. 506; *Rechtin v. McGary*, 117 Ind. 132;
Leggett Co. v. Collier, 89 Iowa, 148; *Betz v. McMorro*, 173 Mass.
8; *Kuppenheimer v. Wertheimer*, 107 Mich. 77; *Dyer v. Railroad*
Co., 51 Minn. 345; *State v. Wingfield*, 115 Mo. 428; *Neimeyer Co. v.*
Railroad Co., 54 Nebr. 321; *Kelsea v. Manufacturing Co.*, 55 N. J. L.
320; *Mee v. McNider*, 109 N. Y. 500; *Johnson v. Hibbard*, 29 Ore. 184;
Garbracht v. Com., 96 Pa. St. 449; *Brooks v. Paper Co.*, 94 Tenn.
701; *Swanke v. McCarty*, 31 Wis. 109; *Pullman Co. v. Railway Co.*,
157 U. S. 94; *Dutton v. Solomonson*, 3 B. & P. 532; *Uniform Sales*
Act, Rule 4 (2).

2. *Hatch v. Oil Co.*, 100 U. S. 124, 25 L. ed. 554, *Pattee, Illus. Cas.*
in Personalty, 249, *Ingler, Cas. in Sales*, 3.

3. *Aldridge v. Johnson*, 26 L. J. Q. B. 296, 7 El. & B. 835; 1 *Me-*
chem, Sales, 598, § 727.

4. *Leigh v. Mobile Co.*, 58 Ala. 165; *Barstow v. Savage Co.*, 64
Cal. 388; *Klein v. Seibold*, 89 Ill. 540, *Ingler, Cas. in Sales*, 138;
Baehr v. Clark, 83 Iowa, 313; *Breckenridge v. McAfee*, 54 Ind. 141;
Strubbee v. Trustees, 78 Ky. 481; *Freeman v. Underwood*, 66 Me.
229, *Pattee, Illus. Cas. in Personalty*, 94; *Gillmore v. Newton*, 91 Mass.
171, 85 Am. Dec. 749; *Nesbitt v. St. Paul Co.*, 21 Minn. 491; *Wilson v.*
Crocket, 43 Mo. 216; *Whitman Co. v. Tritle*, 4 Nev. 494; *Bryant v.*
Whitcher, 52 N. H. 158; *Knox v. Eden Co.*, 143 N. Y. 441; *Roland v.*
Gundy, 5 Ohio, 202; *Quinn v. Davis*, 78 Pa. St. 15; *Parham v. Riley*,
44 Tenn. 9; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Williams*
v. Given, 47 Va. (6 Gratt.) 268; *Ventress v. Smith*, 35 U. S. 161, 9
L. ed. 382; *Uniform Sales Act*, § 23 (1). The Latin maxim is, *Nemo*
datur quod non habet (no one can give who does not have). *Galvin*
v. Bacon, 11 Ma. 28, 25 Am. Dec. 258; *Scollans v. Rollins*, 173 Mass.

in than the finder had and may be compelled to surrender it to the true owner although the buyer purchased in good faith in ignorance of the seller's lack of title, and paid more than the article was worth.⁵

However if a sale is made by authority of law the buyer may obtain a good title although the person conducting the sale may not have title. Thus the purchaser at a sale by a pledgee, after default by the pledgor, will get a good title even though the sale be made in opposition to the wishes of the pledgor, provided the title of the pledgor was good and the sale was made regularly.⁶

275, 73 Am. St. 234; *Williams v. Merle*, 11 Wend. 80, 25 Am. Dec. 604; *Riford v. Montgomery*, 7 Vt. 418; *Peer v. Humphrey*, 2 A. & E. 495.

In England the buyer of goods in certain public markets (markets overt) acquires a good title notwithstanding the title of the seller was defective; *Lyons v. De Pass*, 11 A. & E. 326; 2 Blacks. Comm. 449; but this doctrine never has been recognized in this country. *Coombs v. Gordon*, 59 Me. 112; *Browning v. Magill*, 4 Harr. & J. 308; *Towne v. Collins*, 14 Mass. 400; *Ketchum v. Brennan*, 53 Miss. 596; *Wheelwright v. Depeyster*, 1 Johns. 471, 3 Am. Dec. 345; *Black v. Jones*, 64 N. Car. 318; *Quinn v. Davis*, 78 Pa. St. 15; *Dawson v. Susong*, 57 Tenn. (1 Helsk.) 243; *Griffith v. Fowler*, 18 Vt. 390.

5. *Sadler v. Lewers*, 42 Ark. 148; *Robinson v. Shipworth*, 23 Ind. 311; *Lee v. Bayes*, 18 C. B. 599.

A husband cannot sell his wife's property without her consent, and if he goes through the form of a sale, title does not pass; hence if he retakes such property from the buyer he is not guilty of theft. *Hudspeth v. State*, (Tex. Crim. App. 1908) 112 S. W. 1069.

Where goods were wrongfully disposed of by a bailee thereof, the bailor can recover from a buyer thereof in good faith; *Everett v. Saltus*, 15 Wend. 474, 12 N. Y. Com. Law, 934, aff'd, *Saltus v. Everett*, 20 Wend. 267, 13 N. Y. Com. Law, 850, 32 Am. Dec. 541; the buyer being liable in trover for conversion, without demand. *Seneca Nation v. Hammond*, 8 Thoma. & C. 347.

The owner can recover the value of the goods from anyone who has disposed of them or in any way converted them to his own use. *Sharp v. Parks*, 48 Ill. 511; *Robinson v. Skipworth*, 23 Ind. 311; *Robinson v. Bird*, 158 Mass. 360; *Kearney v. Clutton*, 101 Mich. 106; *Pease v. Smith*, 61 N. Y. 477; *Miller Co. v. Parker*, 155 Pa. St. 208.

6. *Stevens v. Bank*, 31 Conn. 146; *National Bank v. Baker*, 123 Ill. 533; *Guinsburg v. Downs Co.*, 165 Mass. 467, 52 Am. St. 525; *Stearns v. Marsh*, 4 Den. 227; *Conyngham's App.*, 57 Pa. St. 474.

Likewise the title acquired by a purchaser at a sheriff's sale under the same conditions is good.⁷

The owner of goods, by estoppel,⁸ may be precluded from retaking them from an innocent buyer; and in some cases an agent in possession of goods may dispose of them where the necessity for doing so is urgent.⁹

7. *Freeman v. Caldwell*, 10 Watts. 9; *Griffith v. Fowler*, 18 Vt. 390; *Osterman v. Baldwin*, 73 U. S. 116.

If the proceedings were not regular, the buyer does not get any title. *Miller v. Thompson*, 60 Me. 322; *Wheelwright v. Depeyster*, 1 Johns. 471, 3 Am. Dec. 345; *Camp v. Wood*, 10 Watts. 118; *Harris v. Saunders*, 1 Strobb. Eq. 300; *Wells v. Raglan*, 31 Tenn. 501.

If the judgment upon which the sale was based, afterwards be reversed, the title of the buyer is not affected; *Reynolds v. Harris*, 14 Cal. 667; *Feaster v. Fleming*, 56 Ill. 457; *Parker v. Anderson*, 44 Ky. 445; *Gott v. Powell*, 41 Mo. 416; *Jackson v. Caldwell*, 1 Cow. 641; *Taylor v. Boyd*, 3 Ohio, 337; *Feger v. Keefer*, 6 Watts. 297; *Gray v. Brigmordello*, 68 U. S. 627; unless the buyer was connected with the suit in some way; *Reynolds v. Hosmer*, 45 Cal. 616; *Hayes v. Cassell*, 70 Ill. 669; *Stinson v. Ross*, 51 Me. 557; *Dater v. Railroad Co.*, (N. Y.) 2 Hill, 629; *Galpin v. Page*, 85 U. S. 350; the remedy of the defendant being against the plaintiff in the suit. *Bank of U. S. v. Bank of Wash.*, 31 U. S. 8.

If goods not belonging to the judgment debtor are sold, the buyer not only does not obtain a good title but he is liable in trover for conversion. *Baggs v. Fowler*, 16 Cal. 559; *Bartholomew v. Warren*, 32 Conn. 102; *Symonds v. Hall*, 37 Me. 354; *Johnson v. Babcock*, 90 Mass. 583; *Homesley v. Hogue*, 49 N. Car. 431; *Sheanck v. Huber*, 6 Binn. 2; *Stone v. Eberly*, 1 Bay, 317; *Arendale v. Morgan*, 37 Tenn. 103; *Sanborn v. Kittridge*, 20 Vt. 640; *Burke v. McWhirter*, 35 Up. Can. Q. B. 1.

8. *Bent v. Jenkins*, 112 Ala. 485; *Preston v. Witherspoon*, 109 Ind. 457; *Hill v. Wand*, 47 Kans. 340; *Lewenberg v. Hayes*, 91 Me. 104; *Dias v. Chickering*, 64 Md. 348; *Columbus Co. v. Turley*, 73 Miss. 529; *Nixon v. Brown*, 57 N. H. 34; *O'Connor v. Clark*, 170 Pa. St. 318; *Cowdrey v. Vandemburgh*, 101 U. S. 572. Thus if the owner allows another person to treat goods as his own and someone buys them in good faith, the owner is not allowed to take them from the buyer; *Brooks v. Record*, 47 Ill. 30; *Tracy v. Lincoln*, 145 Mass. 357; *Thompson v. Blanchard*, 4 N. Y. 303; *Gregg v. Wells*, 10 A. & E. 90. See *post*, § 321.

9. Thus the master of a vessel, under some circumstances, has implied authority to sell the ship or cargo. *Gates v. Thompson*, 57 Me. 442; *Howland v. Insurance Co.*, 131 Mass. 254; *Butler v. Mur-*

§ 177. **Fraudulent Sales.** As in the case of any contract, fraud makes a sale voidable at the option of the defrauded party, whether seller or buyer; but in the interval between the time the contract was entered into and the time of its avoidance, the title to the goods sold is in the buyer although he was guilty of the fraud, from which it results that if he resells the goods before the defrauded seller avoids the contract, the sub-buyer would acquire a good title,¹⁰ provided the latter purchase for value¹¹

ray, 30 N. Y. 97; *Myers v. Baymore*, 10 Pa. St. 118; *The Amelle*, 73 U. S. 18; *Acatos v. Burns*, 3 Ex. D. 282.

10. *Robinson v. Levi*, 81 Ala. 134; *Sargent v. Sturm*, 23 Cal. 359, 88 Am. Dec. 118; *Williamson v. Russell*, 39 Conn. 406; *Kern v. Thurber*, 57 Ga. 172; *Holland v. Swain*, 94 Ill. 154; *Curme v. Rauh*, 100 Ind. 247; *Wood v. Yeatman*, 54 Ky. 270; *Titcomb v. Wood*, 38 Me. 561; *Hall v. Hinks*, 21 Md. 406; *Easter v. Allen*, 90 Mass. 7; *Cochran v. Stewart*, 21 Minn. 435; *Bank v. Carriage Co.*, 70 Miss. 587; *Wineland v. Coonce*, 5 Mo. 296, 82 Am. Dec. 320; *Kingsbury v. Smith*, 13 N. H. 109; *Zoeller v. Riley*, 100 N. Y. 102, 53 Am. St. 157; *Sinclair v. Healy*, 40 Pa. St. 417, 80 Am. Dec. 589; *Hawkins v. Davis*, 55 Tenn. (8 Baxt.) 506; *Old Co. v. Burckhardt*, 72 Vt. (31 Gratt.) 664; *Singer Co. v. Sammons*, 49 Wis. 316; *White v. Garden*, 20 L. J. C. P. 166, 10 Q. B. 919, 926, *Ingier*, Cas. in Sales, 140; *Uniform Sales Act*, § 24.

11. A person taking goods in payment of an existing debt is not a purchaser for value. *Ames W'ks v. Pulley Co.*, 63 Ark. 87; *Starr v. Stevenson*, 91 Iowa, 684; *Henderson v. Gibbs*, 39 Kans. 679; *Hurd v. Bickford*, 85 Me. 217, 35 Am. St. 353; *Schloss v. Feltus*, 103 Mich. 525, 36 L. R. A. 161; *Sleeper v. Davis*, 64 N. H. 59, 10 Am. St. 377; *DeWitt v. Van Sickle*, 29 N. J. Eq. 209; *Stevens v. Brennan*, 79 N. Y. 258; *Eaton v. Davidson*, 46 Ohio St. 355; *Belleville W'ks v. Samuelson*, 16 Utah, 234; *Poor v. Woodburn*, 25 Vt. 235; *Woonsocket Co. v. Loewenberg*, 17 Wash. 29, 61 Am. St. 902. The theory is that rescission of the contract by the defrauded seller does not leave the creditor in any worse position than he was before.

Contra: *Spira v. Hornthall*, 77 Ala. 137; *Wert v. Naylor*, 93 Ind. 431; *Soule v. Shotwell*, 52 Miss. 236; *Rachman v. Clapp*, 50 Nebr. 648; *Dovey's App.*, 97 Pa. St. 153; *Shufeldt v. Pease*, 16 Wis. 659; *Taylor v. Blakelock*, 32 Ch. D. 560. The courts in these states regard the creditor as a purchaser for value. "A creditor who takes goods in payment, in whole or in part, of a precedent debt, in good faith . . . is lulled into security. He rests in the belief that his debt is paid, and foregoes all effort to seek other payment or

in good faith¹² without notice of the defect in his seller's title.¹³ It is an application of the principle

security. . . . It is a matter of uncertainty that a party so receiving goods in payment of a precedent debt is in no worse condition if they be taken from him than he was before he received them. If he loses a security he might have obtained, . . . or if his vendor becomes insolvent, . . . he is in a worse condition." *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401.

An execution creditor of the buyer is not a purchaser for value, although ignorant of the defect in the buyer's title. 1 *Freeman, Executions* (3d ed.), 762, § 158; *Sargent v. Sturm*, 23 Cal. 359; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Truxton v. Felt*, 1 Pennew. 483, 73 Am. St. 81; *American Co. v. Willsie*, 79 Ill. 92; *Oswego Fact. v. Lendrum*, 57 Iowa, 573, 42 Am. Rep. 53; *Jordan v. Parker*, 56 Me. 557; *Atwood v. Dearborn*, 83 Mass. 483, 79 Am. Dec. 755; *White v. Mitchell*, 38 Mich. 390; *Bidault v. Wales*, 20 Mo. 546, 64 Am. Dec. 205; *Farley v. Lincoln*, 51 N. H. 577, 12 Am. Rep. 182; *Converse v. Sickles*, 146 N. Y. 200; *Field v. Stearns*, 42 Vt. 106; *Bristol v. Willsmore*, 1 B. & C. 514; 2 *Mecham, Sales*, 785, § 924.

If the transferee has partly paid for the goods, he is a bona fide purchaser simply to the extent of his payments before notice. 2 *Mecham, Sales*, 786, § 924; *Schloss v. Feltus*, 96 Mich. 619; *Hoffman v. Strohecker*, 7 Watts, 86, 32 Am. Dec. 740; *Mill Co. v. Finley* (Tex. Civ. App.), 34 S. W. 311.

12. A person is said to buy in good faith when he does not have knowledge of the fact that his seller's title is voidable, nor of facts which would put him on inquiry. *Smith v. Collins*, 94 Ala. 394; *Dyer v. Taylor*, 50 Ark. 314; *Godfrey v. Miller*, 80 Cal. 420; *Smith v. Wellborn*, 75 Ga. 799; *Sanders v. Muegge*, 91 Ind. 214; *Mathison v. Prescott*, 86 Ill. 493; *Bardes v. First B'k*, 122 Iowa, 448; *Gollober v. Martin*, 33 Kans. 252; *Williams v. Snebly*, 92 Md. 9; *Bedford v. Penny*, 58 Mich. 424; *Manwaring v. O'Brien*, 75 Minn. 542; *Tuteur v. Chase*, 66 Miss. 476, 14 Am. St. 577, 4 L. R. A. 632; *Glover v. Hargadine-McKittrick Co.*, 62 Nebr. 483; *Greenwell v. Nash*, 13 Nev. 286; *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L. R. A. 336; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. 515; *Dean v. Connelly*, 6 Pa. St. 239; *Mills v. Howeth*, 19 Tex. 257, 70 Am. Dec. 331; *Hickman v. Trout*, 83 Va. 478; *Reed v. Loney*, 22 Wash. 433; *Keneweg Co. v. Schilansky*, 47 W. Va. 287; *Hooser v. Hunt*, 65 Wis. 71; *Shauer v. Allerton*, 151 U. S. 607, 38 L. ed. 286.

13. *Wilk v. Key*, 117 Ala. 285; *Bowen v. Schuler*, 41 Ill. 192; *Wert v. Naylor*, 93 Ind. 431; *Benesch v. Weil*, 69 Md. 276; *Buffington v. Gerrish*, 15 Mass. 158, 8 Am. Dec. 97; *Hees v. Karr*, 115 Mich. 654; *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289, 53 N. Y. 73, 17 Am. Rep. 208; *Wallace v. Cohen*, 111 N. Car. 103; *Bughman v. Central B'k*, 159 Pa. St. 94; *Singer v. Schilling*, 74 Wis. 369; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 992.

ple that when one of two innocent persons must suffer from the fraud of another, the loss should fall on the one who enabled the commission of the fraud.¹⁴ The distinction between this case and the case of one who buys from a thief or from a finder of goods, is that in the latter case the absolute or general ownership of the goods remains in the original owner, and the thief or the finder does not have any title to transfer except that of *quasi-bailee*; while a fraudulent buyer, until the contract is avoided, has the ownership.

§ 178. **Sales—Mistake as to the Person.** Where a transaction comes under what is designated in the law of contracts as mistake as to the person, that is, where one of the parties thinks he is entering into a contract with some other person than the one with whom he actually deals,¹⁵ the possession only and not the ownership is obtained by fraud. The transaction being void and the transferee not acquiring any title to the goods, he cannot give any title even to one who buys in good faith and without notice, unless there has been unreasonable delay on the part of the seller in reclaiming the goods after discovery of the deception practiced upon him.¹⁶ Thus

14. *Babcock v. Lawson*, 4 Q. B. D. 394.

15. 1 *Mechem, Sales*, 250, § 267; *Aborn v. Merchants' Co.*, 135 *Mass.* 283; *Newberry v. Norfolk Co.*, 133 *N. Car.* 45; *Hentz v. Miller*, 94 *N. Y.* 67; *McCrillis v. Allen*, 57 *Vt.* 505.

If goods are ordered from one person, the order cannot be filled by the successor of such person. *Boston Co. v. Potter*, 123 *Mass.* 28, 25 *Am. Rep.* 9; *Lansden v. McCarty*, 45 *Mo.* 106; *Boulton v. Jones*, 27 *L. J. Exch.* 117, 2 *H. & N.* 564.

16. See *Collins v. Townsend*, 58 *Cal.* 608; *Wilson v. Fisher*, 5 *Houst.* 395; *Perry v. Pearson*, 135 *Ill.* 218; *Evans v. Montgomery*, 50 *Iowa*, 325; *Snyder v. Hegan*, 19 *Ky. Law Rep.* 517; *Herrin v. Libbey*, 36 *Me.* 357; *Byrd v. Rautman*, 85 *Md.* 414; *Bassett v. Brown*, 105 *Mass.* 551; *Smith v. Bank*, 45 *Nebr.* 244; *Willoughby v. Moulton*, 47 *N. H.* 205; *Williamson v. Railroad*, 23 *N. J. Eq.* 277, 29 *N. J. Eq.* 311; *Burton v. Stewart*, 8 *Wend.* 239, 20 *Am. Dec.* 692; *Parmlee v. Adolph*, 28 *Ohio St.* 10; *Chamberlin v. Fuller*, 59 *Vt.* 247; *Pence v. Langdon*, 99 *U. S.* 578, 25 *L. ed.* 420; *Clough v. Railway*, *L. R.* 7 *Exch.* 26.

where a swindler represents himself to the seller as being another person, and, acting as such other person, goes through the form of buying goods, he does not acquire any title thereto,¹⁷ and the goods can be reclaimed from anyone in whose hands they may be found.¹⁸ The person who thought he was selling the goods, was not dealing with the swindler, hence there was not the necessary meeting of minds to form a contract with him; nor could there be any meeting of minds in the case of the one impersonated, as he was in entire ignorance of the transaction.¹⁹

§ 179. **Seller Left in Possession.** It frequently happens that after a sale the goods are left in the possession of the seller. This is regarded in law as enabling the seller to hold out a false credit and to deceive others, possession being a strong indication of ownership;²⁰ hence there is a presumption of fraud in such cases.²¹ In most states, such presumption is *prima facie*²² only,

17. 2 Mechem, Sales, 740, § 887; Dean v. Yates, 22 Ohio St. 388; Barker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697.

18. Peters Co. v. Lesh, 119 Ind. 98, 12 Am. St. 367; Baehr v. Clark, 83 Iowa, 313, 13 L. R. A. 717; Rodliff v. Dallinger, 141 Mass. 1, 55 Am. Rep. 439; Kemper Co. v. Kidder B'k, 72 Mo. App. 226; Hardman v. Booth, 32 L. J. Exch. 105, 1 H. & C. 803.

19. 2 Mechem, Sales, 742, § 887; La Salle Co. v. Coe, 65 Ill. App. 619; Alexander v. Swackhamer, 105 Ind. 81, 55 Am. Rep. 180; Moody v. Blake, 117 Mass. 23; Soltan v. Gerdan, 119 N. Y. 380; Decan v. Shipper, 35 Pa. St. 239, 78 Am. Dec. 334. See, also, Smith Co. v. Stidger, 18 Colo. App. 261; Rogers v. Dutton, 182 Mass. 187.

20. Ticknor v. McClelland, 84 Ill. 471; Streep v. Eckart, 2 Whart. 302; Weeks v. Wead, 2 Alk. 64.

21. 2 Mechem, Sales, 816, § 960; Chamberlain Co. v. Tuttle (N. H.), 71 Atl. 865. For the same point in regard to Mortgages, see post, § 202.

22. Teague v. Bass, 131 Ala. 422; Leibes v. Steffy, 4 Ariz. 11; Smith v. Jones, 63 Ark. 232; Hargrove v. Turner, 112 Ga. 134, 81 Am. St. 4; Higgins v. Spahr, 145 Ind. 167; Kansas Co. v. Couse, 17 Kans. 571; Cochrane v. Gilbert, 92 La. (41 La. Ann.) 735; Goodwin v. Goodwin, 90 Me. 23, 60 Am. St. 231; Ingalls v. Herrick, 108 Mass. 351, 11 Am. Rep. 360; Hopkins v. Bishop, 91 Mich. 328, 30 Am. St. 480; Wilson v. Walrath, 103 Minn. 412; Carter v. Graves, 7 Miss. 9;

and the buyer is allowed to overcome the presumption. In many states, however, if the seller in possession resells, mortgages, or pledges the goods to a third person who takes possession in good faith without notice of the seller's lack of title, or if creditors of the seller levy upon or attach the goods, such second buyer, or the creditors, are allowed to hold the goods as against the original buyer, retention by the seller being regarded as conclusive²² evidence of fraud.

Powell v. Yeazel, 46 Nebr. 225; *Miller v. Pancoast*, 29 N. J. L. 250; *Preston v. Southwick*, 115 N. Y. 139; *Bank v. Levy*, 123 N. Car. 274; *Conrad v. Smith*, 6 N. Dak. 337; *Thorne v. First B'k*, 37 Ohio St. 254; *McCully v. Swackhamer*, 6 Ore. 433; *Harris v. Chaffee*, 17 R. L. 193; *Pregnall v. Miller*, 21 S. Car. 385, 53 Am. Rep. 684; *Callen v. Thompson*, 11 Tenn. 476, 24 Am. Dec. 587; *Bryant v. Kelton*, 1 Tex. 415; *Benjamin v. Madden*, 94 Va. 66; *Bartles v. Dood*, 56 W. Va. 383; *Barr v. Church*, 82 Wis. 382; 2 *Mechem, Sales*, 817, § 960.

There is a statutory provision to this effect in the following jurisdictions: Alaska, Arizona, Indiana, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New York, North Dakota, Oregon, Wisconsin. See 2 *Mechem, Sales*, 818, § 961.

22. *George v. Pierce*, 123 Cal. 172; *Cook v. Mann*, 6 Colo. 21; *Taylor v. Richardson*, 4 Houst. 300; *Volusia B'k v. Bertola*, 44 Fla. 734; *Harkness v. Smith*, 3 Ida. 221; *Thornton v. Davenport*, 2 Ill. 296, 29 Am. Dec. 353; *Martin Co. v. Lesan*, 129 Iowa, 573; *Jarvis v. Davis*, 53 Ky. 529, 61 Am. Dec. 166; *Byer v. Etnyre*, 2 Gill, 150, 41 Am. Dec. 410; *Collins v. Wilhoit*, 108 Mo. 451; *Morris v. McLaughlin*, 25 Mont. 151; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375; *Swartzburg v. Dickerson*, 12 Okla. 566; *Howard v. Dwight*, 3 S. Dak. 398; *Everett v. Taylor*, 14 Utah, 242; *Moore v. Kelley*, 5 Vt. 34, 26 Am. Dec. 283; *Sayward v. Nunan*, 6 Wash. 87; *Cookson v. Swine* (Eng.), 9 App. Cas. 653. See, also, *Colbert v. Baetjer* (D. C.), 4 App. Cas. 416; *Kinney v. First B'k*, 10 Wyo. 115, 93 Am. St. 973.

There is a statutory provision to this effect in the following jurisdictions: California, Colorado, Delaware, Idaho, Iowa, Kentucky, Maryland, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah, Washington, England; and in the Uniform Sales Act, §§ 25, 26.

It is thought better to take away the temptation to manufacture testimony to show that a sale was honest. *Huebler v. Smith*, 62 Conn. 186. It also is an application of the principle that where a loss must be borne by one of two innocent parties, it should be borne by the one whose act or omission has made or contributed to it. *Stephens v. Gifford*, 137 Pa. St. 219.

A question sometimes arises whether there has been a change of possession from the seller to the buyer to rebut the imputation of fraud upon creditors or subsequent purchasers. Actual or constructive delivery suffices.²⁴ Usually notorious acts of ownership by the buyer indicate possession by him without any actual delivery of the goods;²⁵ but, notwithstanding the buyer is in possession, if the seller appears to occupy the same position in relation to the goods that he did before, a sufficient change of possession is lacking.²⁶ The parties cannot avoid the rule by a formal delivery of the goods which is temporary only;²⁷ though a subsequent loan²⁸ of the

24. *O'Brien v. Ballou*, 116 Cal. 318; *Mills v. Camp*, 14 Conn. 219; *Thompson v. Wilhite*, 81 Ill. 356; *Seavey v. Walker*, 108 Ind. 78, 82; *Peycke v. Hazen*, 119 Iowa, 641; *Morton v. Ragan*, 68 Ky. 334; *Parry v. Libbey*, 166 Mass. 112; *Lathrop v. Clayton*, 45 Minn. 124; *Stimson v. Wrigley*, 86 N. Y. 332; *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588. The delivery, however, must be as complete as the circumstances reasonably will admit. 2 *Mechem, Sales*, § 964; *Groff v. Cooper*, 6 Houst. 36; *Garretson v. Hackenberg*, 144 Pa. St. 107.

25. Branding cattle by the buyer thereof is sufficient. *Walden v. Murdock*, 28 Cal. 538.

26. *McKee v. Martin*, 126 Cal. 557; *Mead v. Noyes*, 44 Conn. 487; *Claffin v. Rosenberg*, 42 Mo. 450; *Plaisted v. Holmes*, 58 N. H. 293; *Conrad v. Smith*, 2 N. Dak. 408; *Babb v. Clemson*, 10 Serg. & R. 419; *Wheeler v. Selden*, 63 Vt. 429; *Allen v. Massey*, 84 U. S. 351. Where the owner of a stock of goods sold them to his agent who had assisted him in the store before the sale, there is insufficient change of possession. *Martin v. Duncan*, 156 Ill. 274.

27. *Halstat v. Blakeslee*, 41 Conn. 301; *Allen v. Carr*, 85 Ill. 388; *Sutton v. Ballou*, 46 Iowa, 517; *Goldsbury v. May*, 11 Ky. 254; *Page v. Carpenter*, 10 N. H. 77; *Tilson v. Terwilliger*, 56 N. Y. 273; *Bodenhammer v. Newsom*, 50 N. Car. 107; *Streeper v. Eckart*, 2 Whart. 302, 30 Am. Dec. 258; *Morris v. Hyde*, 8 Vt. 352, 30 Am. Dec. 475. Where the buyer of horses took them home and hitched them in front of his residence for half an hour and then returned them to the seller, the transfer of possession was not sufficient; *McMahill v. Humes*, 21 Ill. App. 513; but if the seller regain possession wrongfully, the rights of the buyer are not prejudiced. *Hall v. Gaylor*, 37 Conn. 550. See, also, *Lynde v. Melvin*, 11 Vt. 683, 34 Am. Dec. 717.

28. *Stevens v. Irwin*, 15 Cal. 503; *O'Gara v. Lowry*, 5 Mont. 427; *Carpenter v. Clark*, 2 Nev. 243; *Towne v. Rice*, 59 N. H. 412; *Knight*

goods to the seller in good faith is not regarded as fraudulent.

Subsequent purchasers and creditors²⁹ who have notice of the prior sale, are not protected; and such notice may be constructive or implied. If the goods are in the possession of a bailee, notice to the bailee is generally sufficient,³⁰ as the fact that the goods had been sold could be learned by inquiry from the bailee. Likewise everybody is presumed to have notice of public sales,³¹ whether by an officer or by a private person, as in the case of a mortgagor's sale;³² and constructive notice is given by

v. Forward, 63 Barb. 311; *Graham v. McCreary*, 40 Pa. St. 515, 30 Am. Dec. 591; *Farnsworth v. Shepard*, 6 Vt. 531. After the possession of the buyer has continued long enough to give reasonable notice of his title, he is not prohibited from bailing the article to the seller just as he might any other article if convenience required. *Reynolds v. Beck*, 108 Mo. App. 183. A loan by the buyer of a horse and wagon to the seller four days after the sale, to drive to town, does not make the transaction fraudulent. *Brown v. Riley*, 22 Ill. 45.

29. In a few states, owing to the statutory wording, creditors can seize goods left in possession of the seller, even though aware of a former sale. *Bassinger v. Spangler*, 9 Colo. 175; *Collins v. Wilhoit*, 108 Mo. 451; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Hutchins v. Gilchrist*, 23 Vt. 82.

30. *Garr v. Hurd*, 92 Ill. 315; *Dempsey v. Gardner*, 127 Mass. 381, 34 Am. Rep. 389; *Carpenter v. Graham*, 42 Mich. 191; *Freiberg v. Steenbock*, 54 Minn. 509; *How v. Taylor*, 52 Mo. 592; *Stowe v. Taft*, 58 N. H. 445; *Caulfield v. Van Brunt*, 173 Pa. St. 428; *Lynde v. Melvin*, 11 Vt. 683. See, also, *Murphy v. Brease*, 3 Ida. 544, 32 Pac. 203; *Young v. Evans*, 118 Iowa, 144; *Butt v. Caldwell*, 7 Ky. 458; *Davenport v. Adler*, 103 La. (52 La. Ann.) 263; *Barney v. Brown*, 2 Vt. 374, 19 Am. Dec. 720.

31. *Bank v. McDade*, 4 Port. 252; *Matteucci v. Whelan*, 123 Cal. 313, 69 Am. St. 60; *Huebler v. Smith*, 62 Conn. 186, 36 Am. St. 337; *Perry v. Foster*, 3 Harr. 293; *Greathouse v. Brown*, 21 Ky. 280, 17 Am. Dec. 63; *Garland v. Chambers*, 19 Miss. 337, 49 Am. Dec. 63; *Clark v. Cox*, 118 Mo. 652; *Bisbing v. Third B'k*, 93 Pa. St. 79, 39 Am. Rep. 726; *Floyd v. Goodwin*, 16 Tenn. 484, 29 Am. Dec. 130; *Boardman v. Keeler*, 1 Aik. 158, 15 Am. Dec. 670; *Watkins v. Birch*, 4 Taunt. 328. See, also, *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375. *Contra*: *Stimson v. Wrigley*, 86 N. Y. 322.

32. *Hanford v. Obrecht*, 49 Ill. 146.

a document evidencing the sale which is recorded properly.³³

§ 180. Buyer in Possession under Conditional Sale. Sales frequently are made and the goods delivered upon condition that the ownership is not to pass to the buyer until some condition has been performed by him, the most usual condition being payment of the price. In such cases under the common law in a few states,³⁴ the doctrine of a condition subsequent or of constructive fraud obtains and a purchaser from the buyer can hold

33. *Osborne v. Tuller*, 14 Conn. 529; *Lowe v. Matson*, 140 Ill. 108; *Vernon v. Morton*, 38 Ky. 247.

34. 1 *Mechem, Sales*, 491, § 600; *Jones v. Clark*, 20 Colo. 353; *Gilbert v. Register Co.*, 176 Ill. 288; *Greer v. Church*, 76 Ky. 430; *Lincoln v. Quynn*, 68 Md. 299, 6 Am. St. 446; *Stadtfeld v. Huntsman*, 92 Pa. St. 53, 37 Am. Rep. 661; 1 *Freeman, Executions* (3d ed.) 507, § 124.

If a transaction is a conditional sale, its real character is not changed by being designated by the parties as a lease. 1 *Mechem, Sales*, 469, § 569; *Hill v. Townsend*, 69 Ala. 286; *Lundy Co. v. White*, 128 Cal. 170, 79 Am. St. 41; *Gerow v. Castello*, 11 Colo. 560, 7 Am. St. 260; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Watertown Co. v. Davis*, 5 Houst. 192; *Sanders v. Wilson*, 19 D. C. 555; *Hays v. Jordan*, 85 Ga. 741, 9 L. R. A. 373; *Forrest v. Hamilton*, 98 Ind. 91; *Budlong v. Cottrell*, 64 Iowa, 234; *Fleck v. Warner*, 25 Kans. 492; *Campbell v. Atherton*, 92 Me. 66; *Smith v. Aldrich*, 18 Mass. 367; *Wickes v. Hill*, 115 Mich. 333; *Domestic Co. v. Anderson*, 23 Minn. 57; *Ham v. Cerniglia*, 73 Miss. 290; *Sumner v. Cottey*, 71 Mo. 121; *Gerish v. Clark*, 64 N. H. 492; *Cole v. Berry*, 42 N. J. L. 308, *Pattee*, Illus. Cas. in *Personalty*, 337; *Clark v. Hill*, 117 N. Car. 11, 53 Am. St. 574; *Sage v. Sleutz*, 23 Ohio St. 1; *Singer Co. v. Graham*, 8 Oreg. 17, 34 Am. Rep. 572; *Carpenter v. Scott*, 13 R. I. 477; *Singer Co. v. Cole*, 72 Tenn. 439, 40 Am. Rep. 20; *Collender Co. v. Marshall*, 57 Vt. 232; *Quinn v. Parke Co.*, 5 Wash. 276; *Hervey v. Locomotive W'ks*, 93 U. S. 664, 23 L. ed. 1003; *Whelan v. Couch*, 26 Grant Ch. 74. Thus a piano delivered under an agreement called a lease, the deliverer paying \$50 on delivery as rent for the first month and agreeing to pay \$50 a month rent for thirteen months thereafter, and if within thirteen months he should pay \$700 the piano should be his, in which case all sums paid as rent were to apply on the purchase-price of \$700, is a mere subterfuge. *Murch v. Wright*, 46 Ill. 478, 95 Am. Dec. 455; 1 *Mechem, Sales*, 471, § 527.

the goods as against the original seller although the original buyer does not perform the condition; and in most of the other states, owing to the opportunity for deceiving innocent persons, statutes³⁵ provide that such sales must be in writing and recorded so as to give notice of the reservation of title by the seller. If this is not done, sub-buyers and creditors of the buyer, without notice,³⁶ are protected, thus changing the common law rule previously existing in such states that a purchaser from the buyer, or creditors of the buyer, although acting in good

35. Such statutes have been enacted in the following jurisdictions: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Ontario, New Brunswick, Nova Scotia, Manitoba, British Columbia, Prince Edward Island, Northwest Territories, and England. See, 1 *Mechem, Sales*, 494, § 603; *Brandon Co. v. Bostick*, 126 Ala. 247; *Tufts v. Beach*, 8 Colo. App. 33; *National Co. v. Lesko*, 77 Conn. 276; *Hudnell v. Paine*, 39 Fla. 67; *Anderson v. Adams*, 117 Ga. 919; *Rock I. Co. v. Maynard B'k*, 123 Iowa, 640; *Moline Co. v. Witham*, 52 Kans. 185; *Welch v. National Co.*, 103 Ky. 30; *Hopkins v. Maxwell*, 91 Me. 247; *National B'k v. Chicago Co.*, 44 Minn. 224, 9 L. R. A. 263; *Jennings v. Wilson*, 71 Miss. 42; *Redenbaugh v. Kelton*, 130 Mo. 558; *Regier v. Craver*, 54 Nebr. 507; *Churchill v. Demeritt*, 71 N. H. 110; *Knowles W'ks v. Vacher*, 57 N. J. L. 490, 33 L. R. A. 305; *Duntz v. Granger Co.*, 33 N. Y. Supp. 957, 41 Misc. 177, *aff'd* 96 App. Div. 631; *Hinkle v. Greene*, 125 N. Car. 489; *Speyer v. Baker*, 59 Ohio St. 11; *Herring v. Cannon*, 21 S. Car. 212, 53 Am. Rep. 661; *Knittel v. Cushing*, 57 Tex. 354, 44 Am. Rep. 598; *Desany v. Thorp*, 70 Vt. 31; *Arbuckle v. Gates*, 95 Va. 302; *Eisenberg v. Nichols*, 22 Wash. 70, 79 Am. St. 917; *Troy W'ks v. Hutton*, 53 W. Va. 154; *Mississippi Co. v. Miller*, 109 Wis. 77; *Helby v. Matthews*, [1894] 2 Q. B. 262, [1895] A. C. 471. See, also, *Lee v. Gorham*, 165 Mass. 130.

36. Third persons having notice are not protected. 1 *Mechem, Sales*, 497, § 604; *Jones v. Clark*, 20 Colo. 353; *Unmack v. Douglass*, 75 Conn. 633; *Anderson v. Adams*, 117 Ga. 919; *First B'k v. Tufts*, 53 Kans. 710; *Van Buren v. Stubbings*, 149 Mich. 206; *Dyer v. Thorstad*, 35 Minn. 534; *Coover v. Johnson*, 86 Mo. 533; *Norton v. Pilger*, 30 Nebr. 860; *Singer Co. v. Nash*, 70 Vt. 434; *Perkins v. Best*, 94 Wis. 162.

faith without notice of the condition, do not acquire any better title than the original buyer had.³⁷

§ 181. **Sales—Delivery.** It is the duty, usually implied,³⁸ of the seller to deliver the goods³⁹ when everything has been done by the buyer to entitle him to possession.⁴⁰ Delivery is placing the buyer in the same position of control over the article as the seller had; and must not be confused with sending the goods. In the absence of agreement, either express, or implied from usage or from course of dealing,⁴¹ the seller is not under any duty to send the goods to the buyer;⁴² but it is the duty of the seller to transfer possession.

The place of delivery, in the absence of agreement, is the seller's place of business if he have one, or, if not, at his residence.⁴³ However, if the sale is of specific goods known by the parties to be in a particular place, the place of delivery is where the goods are.¹

Delivery is either actual, constructive,² or symbolical. Actual delivery is the manual tradition or bodily passing of the goods from the seller to the buyer. Constructive delivery is that deduced from circumstances when

37. 1 Mechem, Sales, 488, §§ 597, 599.

38. Gray v. Walton, 107 N. Y. 254, Ingler, Cas. in Sales, 149.

39. 2 Mechem, Sales, 961, § 1116; Martineau v. Kitching, L. R. 7 Q. B. 436, 449; Uniform Sales Act, § 41.

40. 2 Mechem, Sales, 963, § 1118.

41. Hatch v. Oil Co., 100 U. S. 124, 25 L. ed. 554, Pattee, Illus. Cas. in Personalty, 249.

42. 2 Mechem, Sales, 1033, § 1187.

43. Sousely v. Burns' Adm'r, 73 Ky. 87; Janney v. Sleeper, 30 Minn. 473; Bliss Co. v. United Co., 149 N. Y. 300; Uniform Sales Act, § 42.

1. 2 Mechem, Sales, 966, § 1124; Ragland v. Wood, 71 Ala. 145, 46 Am. Rep. 305; Phoenix W'ks v. Capelle Co., 9 Houst. 232; Wilmouth v. Patton, 5 Ky. 280; Middlesex Co. v. Osgood, 70 Mass. 447; Janney v. Sleeper, 30 Minn. 473; Gray v. Walton, 107 N. Y. 254, Ingler, Cas. in Sales, 149; Perlman v. Sartorius, 162 Pa. St. 320, 42 Am. St. 834. As cattle in a field. Smith v. Gillett, 50 Ill. 290; Dakota Co. v. Price, 22 Nebr. 96.

2. McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 538.

actual delivery would be impracticable, such as a transfer of ponderous bodies³ or of growing crops;⁴ or where actual delivery would be an idle ceremony,⁵ as in the case

Delivery may be—

Actual; which is manual tradition.

Constructive, that is, the law construes delivery to have been made; which may be—

Where actual delivery would be an idle ceremony; as in the case of—

Goods already in the possession of the deliverer.

Goods in the possession of a third person.

Goods left in the possession of the seller as bailee of the buyer (usually insufficient as to third persons).

Where actual delivery is impracticable; as in the case of—

Ponderous articles.

Growing crops.

Symbolical; as—

A part of a mass to represent the whole.

The evidence of title.

A key to the place where the goods are.

Usually in making a classification, it is difficult, sometimes impossible, to make one which will be technically and rigidly accurate. Some topics seem to belong to more than one division. However, a classification is not important except to aid in an orderly treatment of the subject, and several classifications might be made, all equally good, depending upon the manner in which the subject naturally presents itself to the mind of the classifier. Some authors and judges designate Symbolical delivery as one form of Constructive delivery; and some insist that the delivery of a key or of the evidence of title is Actual delivery, as it gives the deliverer full control over the goods; (*Wilkes v. Ferris*, 5 Johns. 335; *Barr v. Reitz*, 53 Pa. St. 256, *Ingler, Cas. in Sales*, 153; *Ward v. Turner*, 2 Ves. 431); and that these articles are not intended as symbols. Possibly this might depend upon circumstances.

3. *White v. McCracken*, 60 Ark. 613; *Bethel Co. v. Brown*, 57 Me. 9; *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 308; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Anderson v. Brenneman*, 44 Mich. 198; *Tognini v. Kyle*, 17 Nev. 209, 45 Am. Rep. 442; *Hayden v. Demets*, 53 N. Y. 426; *Williams v. Rolling Co.*, 174 Pa. St. 299; *Kingley v. White*, 57 Vt. 565; *Leonard v. Davis*, 66 U. S. 476, 17 L. ed. 222.

4. 2 *Mechem, Sales*, 1044, § 1199; *Ticknor v. McClelland*, 84 Ill. 471; *Bellows v. Wells*, 36 Vt. 600.

5. *Norton v. Hummel*, 22 Ill. App. 194; *Hayden v. Frederickson*, 59 Nebr. 141.

of goods already in the possession of the buyer,⁶ or in the possession of a third person, when delivery may be made by notice to him.⁷ Symbolical delivery is the delivery of something as the representative of the article delivered, such as a key⁸ to a building or to a room where the goods are stored; the delivery of a bill of sale of an absent article, such as a ship at sea;⁹ the transfer of a bill of lading;¹⁰ or the delivery of a few articles of a mass.¹¹

6. 2 Mechem, Sales, 1046, § 1202; *Lake v. Morris*, 20 Conn. 201; *Nichols v. Patton*, 18 Me. 231, 36 Am. Dec. 713; *Warden v. Marshall*, 99 Mass. 305; *Griffin v. Wright*, 1 Tex. App. Civ. Cas., § 638; *Snider v. Thrall*, 56 Wis. 674; *Re Batchelder*, 2 Lowell, 245. See, also, *Manton v. Moore*, 7 D. & El. 67.

7. 2 Mechem, Sales, 1040, § 1193; *Edwards v. Meadows*, 71 Ala. 42; *Gaar v. Hurd*, 92 Ill. 315; *Campbell v. Hamilton*, 63 Iowa, 293; *Dempsey v. Gardner*, 127 Mass. 381, 84 Am. Rep. 389; *Ingler, Cas. in Sales*, 154; *Freiberg v. Steenbock*, 54 Minn. 509; *Stowe v. Taft*, 58 N. H. 445; *Boswell v. Green*, 25 N. J. L. 390; *Buhl W'ks v. Teuton*, 67 Mich. 623; *Stokes v. Mackey*, 147 N. Y. 223; *Woods v. Hull*, 81 Pa. St. 451; *Hildreth v. Fitts*, 53 Vt. 684; *Smith v. Chance*, 2 B. & Ald. 753.

8. 2 Mechem, Sales, 1043, § 1197; *Howe v. Johnson*, 117 Cal. 37; *Conley v. Friedman*, 6 Colo. App. 160; *Kellogg Co. v. Peterson*, 162 Ill. 158; *Vining v. Gilbreth*, 39 Me. 496; *Packard v. Smore*, 65 Mass. 283; *Wilkes v. Ferris*, 5 Johns. 335; *Morrison v. Olum*, 3 N. Dak. 76; *Benford v. Schell*, 55 Pa. St. 393; *Chappel v. Marvin*, 2 Aik. 79; *Hilton v. Tucker*, 39 Ch. D. 669.

9. 2 Mechem, Sales, 1045, § 1201. The buyer, however, must take actual possession as soon as the circumstances will permit. *Carter v. Willard*, 36 Mass. 1; *Ricker v. Cross*, 5 N. H. 570, 22 Am. Dec. 480; *Crape v. Kelley*, 83 U. S. 610, 21 L. ed. 430; *Atkinson v. Maling*, 2 T. R. 463.

10. 2 Mechem, Sales, 1041, § 1194; *King v. Jarman*, 35 Ark. 190; *Davis v. Russell*, 52 Cal. 611, 28 Am. Rep. 647; *Burton v. Curryea*, 49 Ill. 320, 89 Am. Dec. 350; *Kentucky Co. v. Globe Co.*, 104 Ky. 559, 84 Am. St. 463, 42 L. R. A. 353; *Flash v. Schwabacker*, 83 La. (32 La. Ann.) 356; *McKee v. Garcelon*, 60 Me. 165, 11 Am. Rep. 200; *Stone v. Swift*, 21 Mass. 389, 16 Am. Dec. 349; *First B'k. v. McAndrews*, 5 Mont. 323, 51 Am. Rep. 51; *Hazard v. Fiske*, 83 N. Y. 237; *Wadhams v. Balfour*, 32 Oreg. 313; *Campbell v. Alford*, 75 Tex. 159; *Davis v. Bradley*, 28 Vt. 118, 65 Am. Dec. 226; *Conard v. Atlantic Co.*, 26 U. S. 386; *Sanders v. MacLean*, 11 Q. B. D. 327.

11. *Ingalls v. Herrick*, 103 Mass. 351, 11 Am. Rep. 369.

A delivery to be made in one month means a calendar month.¹² Where the computation is by days, consecutive days, including Sundays, are meant.¹³ Delivery must be made at a reasonable hour.¹⁴

If a seller tenders a less¹⁵ or a larger¹⁶ quantity than is called for in the contract, or if the goods be mixed with goods of a different class,¹⁷ the buyer is at liberty

12. 2 Mechem, Sales, 977, § 1135; *Churchill v. Merchants' Bk.*, 86 Mass. 532; *Leffingwell v. White*, 1 Johns. Cas. 99, 1 Am. Dec. 97; *Webb v. Fairmaner*, 3 M. & W. 473.

If a contract is made on January 1st to be performed in one month, the date of performance would be February 1st. If made February 1st, the date of performance would be March 1st. If made February 28th of an ordinary year, the date of performance would be March 28th; but if made January 28th, 29th, 30th, or 31st, the date of performance would be February 28th.

13. *Disney v. Furness*, 79 Fed. 810; *Brown v. Johnson*, 10 M. & W. 231.

If the last day of performance falls on Sunday or on a legal holiday it is excluded. *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530.

14. *Startup v. Macdonald*, 6 M. & G. 593, 46 Eng. Com. Law, 591; *Uniform Sales Act*, § 43 (4). Where wool was tendered at 10 P. M. on the last day of delivery, but the owner of the warehouse where the wool was stored, refused to allow the buyer to use a light because the insurance would be invalidated thereby, it was not a sufficient delivery. *Croninger v. Crocker*, 62 N. Y. 151, *Ingler, Cas. in Sales*, 155.

15. 2 Mechem, Sales, 1016, § 1161; *Wright v. Barnes*, 14 Conn. 518; *Rockford Co. v. Lent*, 63 Ill. 238; *Smith v. Lewis*, 40 Ind. 98; *Kuhlman v. Wood*, 81 Iowa, 128; *Salmon v. Boykin*, 66 Md. 541, *Ingler, Cas. in Sales*, 157; *Marland v. Stanwood*, 101 Mass. 470; *Crowl v. Goodenberger*, 112 Mich. 683; *Churchill v. Holton*, 38 Minn. 519; *Haines v. Tucker*, 50 N. H. 307; *Prince v. Engelke*, 68 N. J. L. 567; *Hill v. Heller*, 27 Hun, 416; *Rochester Co. v. Hughey*, 56 Pa. St. 322; *Inman v. Elk Mills*, 116 Tenn. 141; *Newell v. New H. Co.*, 119 Wis. 635; *Cleveland Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Waddington v. Oliver*, 2 B. & P. N. R. 61; *Uniform Sales Act*, § 44 (1).

16. 2 Mechem, Sales, 1011, § 1158; *Bedell v. Kowalsky*, 99 Cal. 236; *Rommel v. Wingate*, 103 Mass. 327; *Chandler v. De. Graff*, 27 Minn. 208; *Downer v. Thompson* (N. Y.), 2 Hill, 137, *Ingler, Cas. in Sales*, 159; *Stevenson v. Burgin*, 49 Pa. St. 36; *Perry v. Iron Co.*, 16 R. I. 318; *Barton v. Kane*, 17 Wis. 38, 34 Am. Dec. 728; *Kalamazoo Co. v. Simoa*, 129 Fed. 144; *Dixon v. Fletcher*, 3 M. & W. 146; *Uniform Sales Act*, § 44 (2).

17. *Clark v. Baker*, 52 Mass. 186, 45 Am. Dec. 199; *Walker v. Davis*, 65 N. H. 170; *Sun Co. v. Minnesota Co.*, 22 Oreg. 49; *Hoffman v.*

to reject the tender; or he may accept such goods as conform to the contract,¹⁸ having an action for damages if the amount be less.¹⁹

The parties frequently can protect themselves against liability by the use of such qualifying words as "more or less," "about," "nearly," or "say."²⁰ If such words have been used, referring to goods which are in some particular warehouse,²¹ or which are to be shipped in a particular vessel, or which are to be supplied to the buyer for some particular purpose, the amount named is regarded as an estimate,²² and great latitude is allowed provided good faith was used;²³ but, in other cases, the deviation must be reasonable.²⁴ Thus, where the govern-

King, 58 Wis. 314; *Levy v. Green*, 28 L. J. Q. B. 319, 1 E. & E. 969, 102 Eng. Com. Law, 968, 8 E. & B. 575; Uniform Sales Act, § 44 (3.)

18. *Cohen v. Pemberton*, 58 Conn. 221; *Avery v. Wilson*, 81 N. Y. 341, 37 Am. Rep. 508; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366.

If the seller send more, the buyer may separate the quantity contracted for. *Martz v. Putnam*, 117 Ind. 392; *Rommel v. Wingate*, 103 Mass. 327; *Iron Co. v. Buhl*, 43 Mich. 86; *Downer v. Thompson*, (N. Y.) 2 Hill, 137, 6 Hill, 208.

19. *Harralson v. Stein*, 50 Ala. 347, *Ingler, Cas. in Sales*, 158; *Richards v. Shaw*, 67 Ill. 222; *Bowker v. Hoyt*, 33 Mass. 555; *Clark v. Moore*, 3 Mich. 55; *Holmes v. Gregg*, 66 N. H. 621; *Saunders v. Short*, 86 Fed. 225, 58 U. S. App. 689.

20. 2 *Mechem, Sales*, 1020, § 1166; *Chicago v. Galpin*, 183 Ill. 399; *Shepard v. Lynch*, 26 Kans. 377; *Cabot v. Winsor*, 83 Mass. 546; *Day v. Cross*, 59 Tex. 595; *U. S. v. Pine Co.*, 89 Fed. 907, 32 C. C. A. 406, 61 U. S. App. 80; *McConnel v. Murphy*, L. R. 5 P. C. 203.

21. 2 *Mechem, Sales*, 1021, § 1168; *Thurber v. Ryan*, 12 Kans. 453; *Callmeyer v. Mayor*, 83 N. Y. 116; *Standard Refin. v. Castano*, 43 Fed. 279; *Tancred v. Steel Co.* 15 App. Cas. 125.

22. *Morris v. Wibaux*, 159 Ill. 627; *McLay v. Perry*, 44 L. T. N. S. 152.

23. 2 *Mechem, Sales*, 1022, § 1169; *Navassa Co. v. Guano Co.* 93 Ga. 92; *Pembroke Co. v. Parsons*, 71 Mass. 589, *Ingler, Cas. in Sales*, 161; *Robinson v. Noble*, 33 U. S. 181, 8 L. ed. 910; *Gwillim v. Darnell*, 3 C. M. & R. 61.

24. *Polhemus v. Heiman*, 45 Cal. 573; *Low v. Freeman*, 12 Ill. 469; *Salmon v. Boykin*, 66 Md. 541; *Clapp v. Thayer*, 112 Mass. 296; *Sample v. Pickard*, 74 Mich. 416; *Patterson v. Judd*, 27 Mo. 563; *Creighton v. Comstock*, 27 Ohio St. 548; *Norrington v. Wright*, 115 U. S. 188,

ment advertised for 880 cords of wood, more or less, for an army post, where that amount had been used in prior years, but, on account of the withdrawal of a large portion of the troops from the post, 40 cords only were required, the seller was unable to recover damages for a refusal by the buyer to take more;²⁵ but where there was a contract to sell 262 cattle, more or less, a delivery of 176 was held not to be a performance of the contract.²⁶

Where the contract expressly or impliedly²⁷ requires the seller to ship the goods to the buyer, delivery of the goods to a carrier is delivery to the buyer,²⁸ the carrier

29 L. ed. 366; *Cross v. Eglin*, 2 B. & Ad. 106, 22 Eng. Com. Law, 53. In *Holland v. Rea*, 48 Mich. 218, where the contract was for the sale of 500,000 feet of lumber, "more or less," and 473,000 feet were delivered, the court held that the deviation was reasonable.

25. *Brawley v. U. S.*, 96 U. S. 168, 24 L. ed. 622.

26. *Tilden v. Rosenthal*, 41 Ill. 385, 89 Am. Dec. 388.

27. *Hague v. Porter*, (N. Y.) 3 Hill, 141. If the goods are delivered to a carrier without any express or implied direction to do so, the risk does not pass to the buyer. *Loyd v. Wright*, 20 Ga. 574, 65 Am. Dec. 636.

28. 1 Mechem, Sales, 611, § 736; *Bradford v. Marbury*, 12 Ala. 520, 46 Am. Dec. 264; *Burton v. Band*, 44 Ark. 556; *Whiting v. Farrand*, 1 Conn. 60; *McCullough v. Armstrong*, 118 Ga. 424; *Stafford v. Walter*, 67 Ill. 83; *Tegler v. Shipman*, 33 Iowa, 194, 11 Am. Rep. 113; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Torrey v. Corliss*, 33 Me. 333; *Farmers' Co. v. Gill*, 69 Md. 537; *Prince v. Boston Co.*, 101 Mass. 542, 100 Am. Dec. 129; *Kessler v. Smith*, 42 Minn. 494; *McKee v. Bainter*, 52 Nebr. 604; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Kelsea v. Manufacturing Co.*, 55 N. J. L. 320, 22 L. R. A. 415; *Krulder v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Garbracht v. Com.*, 96 Pa. St. 449, 42 Am. Rep. 550; *Hobart v. Littlefield*, 13 R. I. 341; *State v. O'Neill*, 58 Vt. 140, 56 Am. Rep. 557; *Sarbecker v. State*, 65 Wis. 171, 56 Am. Rep. 624; *Halliday v. Hamilton*, 78 U. S. 560; *Dutton v. Solomonson*, 3 B. & P. 582, 584; *Uniform Sales Act*, § 46 (1).

If the seller is to deliver the goods at the buyer's residence, delivery to a carrier for transmission to the place of residence, is not delivery to the buyer. 1 Mechem, Sales, 607, § 733; *Devine v. Edwards*, 101 Ill. 138; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; *Suit v. Woodhall*, 113 Mass. 391; *McNeal v. Braun*, 53 N. J. L. 617, 26 Am. St. 441; *Acme Co. v. Atlantic Co.*, (N. Car.) 62 S. E. 557; *Bellefontaine v. Vassaux*, 55 Ohio St. 323; *Braddock Co. v. Irwin*, 153 Pa. St. 440; *Mc*

being regarded as the agent of the buyer; nor does it make any difference that the buyer does not designate the carrier by which the goods are to be sent.²⁹ From this it results that the risk as to the goods falls on the buyer after the carrier is placed in possession,³⁰ provided the goods are properly packed and addressed,³¹ are in a merchantable condition when leaving the hands of the seller,³² and he has made a proper contract with the carrier so as to give the buyer a remedy in case of loss.³³ If the seller takes a bill of lading to his own order, he thereby retains the rights to dispose of the goods; in

Laughlin v. Marston, 78 Wis. 670; *McElwee v. Metropolitan Co.*, 69 Fed. 302, 16 C. C. A. 232; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 222.

29. If the buyer does designate the carrier, and the seller sends by another, the carrier is the agent of the seller. *Wheelhouse v. Parr*, 141 Mass. 593; *Iasigi v. Rosenstein*, 65 Hun. 591; *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 372.

30. *Whitting v. Farrand*, 1 Conn. 60; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; *Lord v. Edwards*, 148 Mass. 476, 2 L. R. A. 519; *Ingler, Cas. in Sales*, 168; *Jones v. Bloomgarden*, 143 Mich. 326; *Mobile Co. v. McGuire*, 81 Minn. 232; *Mee v. McNider*, 109 N. Y. 500; *McHenry v. Bullfant*, 207 Pa. St. 15; *Ranney v. Higby*, 4 Wis. 154, 5 Wis. 62; *Bull v. Robinson*, 42 L. J. Exch. 165, 10 Exch. 342. See Uniform Sales Act, § 22 (a.)

31. 1 Mechem, Sales, 624, § 747; *Willson v. Western Co.*, 11 Ind. App. 89; *Garretson v. Selby*, 37 Iowa, 529, 18 Am. Rep. 14; *Finn v. Clark*, 92 Mass. 479, 94 Mass. 522.

32. *Leggat v. Sands Co.*, 60 Ill. 158; *Charles v. Carter*, 96 Tenn. 607; *English v. Spokane Co.*, 57 Fed. 451, 6 C. C. A. 416, 15 U. S. App. 218.

33. 1 Mechem, Sales, 624, § 748; *Ward v. Taylor*, 56 Ill. 494, *Ingler, Cas. in Sales*, 168; *Buckman v. Levi*, 3 Campb. 414; Uniform Sales Act, § 46 (2.)

Where the carrier is liable for a limited value only unless the true value is stated and additional freight paid, and the seller sends goods ten times that value without stating it and the goods are lost, the seller cannot recover the price from the buyer. *Clarke v. Hutchins*, 14 East, 475.

If the buyer orders the goods shipped insured, it being a custom of the trade for goods to be shipped insured when instructions are given to that effect, and the goods are sent without being insured, the carrier is not the agent of the buyer. *McDonald v. Pearre*, (Ga. App.) 62 S. E. 330.

such case the title remains in the seller and does not pass to the buyer upon delivery to the carrier.³⁴

§ 182. Sales—Acceptance by Buyer. Before accepting the goods, that is, assenting to become the owner of the specific goods tendered by the seller, the buyer has a right to examine them for the purpose of ascertaining whether they conform to the contract³⁵ unless he previously has examined them;³⁶ and if necessary³⁷ he may

24. 1 Mechem, Sales, 648, § 774; Tishomingo Inst. v. Johnson, 140 Ala. 691; Berger v. State, 50 Ark. 20; Ramish v. Kirschbraun, 107 Cal. 659; Erwin v. Harris, 37 Ga. 323; Ward v. Taylor, 56 Ill. 494; Sohn v. Jervis, 101 Ind. 578; Merchants' B'k v. Citizens' B'k, 98 Iowa, 650, 57 Am. St. 284; Kentucky Co. v. Globe Co., 104 Ky. 559, 84 Am. St. 468, 42 L. R. A. 353; Hopkins v. Cowen, 90 Md. 152, 47 L. R. A. 124; Wright Co. v. Warren, 177 Mass. 283; Security B'k v. Luttgen, 29 Minn. 363; Bergeman v. Railroad Co., 104 Mo. 77; Willman Co. v. Fussy, 15 Mont. 511; Neimeyer Co. v. Burlington Co., 54 Nebr. 321, 40 L. R. A. 534; First B'k v. Northern Co., 58 N. H. 203; Furman v. Union Co., 106 N. Y. 579; Emery's Sons v. Irving B'k, 25 Ohio St. 360, 18 Am. Rep. 299; Pennsylvania Co. v. Stern, 119 Pa. St. 24, 4 Am. St. 626; Greenwood Co. v. Canadian Co., 72 S. Car. 450, 3 L. R. A. N. S. 79; Bank v. Cummings, 39 Tenn. 609, 24 Am. St. 618; Grayson B'k v. Nashville R'y, (Tex. Civ. App.) 79 S. W. 1094; Joslyn v. Grand T. Co., 51 Vt. 92; Doyle v. Mfg. Co., 76 Wis. 48; North P. R. R. v. Commercial B'k, 123 U. S. 727, 21 L. ed. 287; Craven v. Ryder, 6 Taunt. 433; Uniform Sales Act, § 20 (2.)

35. 2 Mechem, Sales, 1188, § 1375; Elliott v. Howison, 146 Ala. 568; Demens v. LeMoynes, 26 Fla. 323; Underwood v. Wolf, 131 Ill. 425; Weil v. Stone, 33 Ind. App. 112, 104 Am. St. 243; McCarty v. Gordon, 16 Kans. 35; Lincoln v. Gallagher, 79 Me. 189; Alden v. Hart, 161 Mass. 576; Schloss v. Feltus, 96 Mich. 619; Knoblauch v. Kronschnabel, 18 Minn. 300 (Gil. 272); Boothby v. Plaisted, 51 N. H. 436, 12 Am. Rep. 140; Salomon v. King, 63 N. J. L. 39; Pierson v. Crooks, 115 N. Y. 589, 12 Am. St. 831; Wadhams v. Balfour, 32 Ore. 313; Fogel v. Brubaker, 122 Pa. St. 7; Charles v. Carter, 96 Tenn. 607; Pope v. Allis, 115 U. S. 362, 29 L. ed. 393, Ingler, Cas. in Sales, 167, 169; Lorymer v. Smith, 1 B. & C. 1; Uniform Sales Act, § 47 (1.)

It is the duty of the buyer to accept the goods if they conform to the contract. 2 Mechem, Sales, 1181, § 1363; Uniform Sales Act, § 41.

36. Brownlee v. Bolton, 44 Mich. 218; Cefalu v. Fitzsimmons, 65 Minn. 480; Pease v. Copp, 67 Barb. 132; Holt v. Pie, 120 Pa. St. 425; Peace Co. v. Grafflin, 58 Fed. 550.

37. Cream Co. v. Friedlander, 34 Wis. 52, 36 Am. St. 395, 21 L. R. A. .

use a reasonable³⁸ quantity of the goods for the purpose of testing them,³⁹ even though the test destroys the portion tested.⁴⁰ Acceptance may be implied if the buyer exercises acts of ownership over the goods,⁴¹ such as using,⁴² selling,⁴³ or attempting⁴⁴ to sell them; or after a reasonable time has elapsed without their rejection.⁴⁵ In the absence of agreement on the point, the buyer, right-

38. *Nelson v. Overman*, 19 Ky. Law Rep. 161. In *Philadelphia Co. v. Detroit W'ks*, 58 Mich. 29, the use of 42 out of 300 barrels of whiting was held reasonable; but in *Lucy v. Mouflet*, 5 H. & N. 229, the use of 20 gallons out of a hogshead of cider was held to be more than sufficient. It is a question of fact whether a reasonable quantity was used. If the buyer uses more than necessary the right of rejection is lost. *Zipp Co. v. Pastorino*, 120 Wis. 176.

39. 2 *Mechem, Sales*, 1190, § 1378.

40. *Zipp Co. v. Pastorino*, 120 Wis. 176.

41. *Sisson Co. v. Haak*, 139 Mich. 383; *Woodward v. Emmons*, 61 N. J. L. 281; Uniform Sales Act, § 48. See, *ante*, § 163. Making alterations in the goods is an act of ownership indicative of acceptance. *Bascom v. Manufacturing Co.*, 132 Pa. St. 427.

42. *Electric Co. v. Frisbie*, 66 Conn. 67; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Brown v. Foster*, 108 N. Y. 387; *Cream Co. v. Friedlander*, 84 Wis. 53, 36 Am. St. 895, 21 L. R. A. 135; *Lion v. Bertram*, 61 U. S. 149, *Ingler, Cas. in Sales*, 170; *Harnor v. Groves*, 15 C. B. 667.

43. *Marshall v. Ferguson*, 23 Cal. 65; *Watkins v. Paine*, 57 Ga. 50; *Wolf v. Dietzsh*, 75 Ill. 205; *Rock Co. v. Meredith*, 107 Iowa, 498; *Delamater v. Chappell*, 48 Md. 244; *Warden v. Marshall*, 99 Mass. 305; *Brown v. Nelson*, 66 Vt. 660, *Ingler, Cas. in Sales*, 10; *Hill v. McDonald*, 17 Wis. 97; *Robinson v. Gordon*, 23 Up. Can. Q. B. 143. A sale of a part is acceptance of the whole. *Lenz v. Blake-McFall Co.*, 44 Oreg. 569; *Parker v. Palmer*, 4 B. & Ald. 387.

44. *Parker v. Palmer*, 4 B. & Ald. 387.

45. 2 *Mechem, Sales*, 1193, § 1380; *Treadwell v. Reynolds*, 39 Conn. 31; *Gray v. Consolidated Co.*, 103 Ga. 105; *Moore Co. v. Sloone*, 166 Ill. 457; *Berthold v. SeEVERS Co.*, 89 Iowa, 506; *Lincoln v. Gallagher*, 79 Me. 189; *Hobbs v. Massasoit Co.*, 158 Mass. 194, *Ingler, Cas. in Sales*, 171; *Jones v. Bloomgarden*, 143 Mich. 826; *Auerbach v. Wunderlich*, 76 Minn. 42; *Gaff v. Homeyer*, 59 Mo. 345; *Woodward v. Emmons*, 61 N. J. L. 281; *Mason v. Smith*, 130 N. Y. 474; *Indiana Co. v. Hayes*, 155 Pa. St. 160; *Boughton v. Standish*, 48 Vt. 594; *McCormick Co. v. Winans*, 126 Wis. 649; *Foss-Schneider Co. v. Bullock*, 59 Fed. 83, 8 C. C. A. 14, 16 U. S. App. 311; *Toulmin v. Hedley*, 2 C. & K. 157.

fully having rejected the goods, is not under any legal duty to return them,⁴⁶ anything indicating to the seller that the goods are rejected being sufficient.⁴⁷

§ 183. Remedies of Seller as to the Goods—Seller's Lien. A seller who has not been paid may have several remedies available, some of which may be enforced through the goods themselves, while others are against the buyer personally; or both methods may be employed at the same time.

A common law lien is the mere right to retain possession of the personal property of another until a debt or charge is satisfied. Generally after the ownership has passed to the buyer⁴⁸ but before delivery of the goods has been made,⁴⁹ a seller who has not been paid has a common law lien on the goods, known as the seller's lien, and may refuse to deliver them;¹ and he has the right to retain all or a portion² of the goods until pay-

46. *Gray v. Consolidated Co.*, 103 Ga. 115; *Doan v. Dunham*, 65 Ill. 512; *Alden v. Hart*, 161 Mass. 576; *Straus v. Furniture Co.*, 76 Miss. 343; *Spaulding v. Hanscom*, 67 N. H. 401, *Ingler, Cas. in Sales*, 172; *Starr v. Torrey*, 22 N. J. L. 190; *Gibson v. Vail*, 53 Vt. 479; *Uniform Sales Act*, § 50.

47. *McCormick Co. v. Cochran*, 64 Mich. 636; *McCormick Co. v. Chesrown*, 33 Minn. 32; *Hardt v. Electric Co. (N. Y.)*, 84 App. Div. 249; *Rheinstrom v. Steiner*, 69 Ohio St. 452, 100 Am. St. 699; *Exhaust Co. v. Chicago Co.*, 66 Wis. 218, 57 Am. Rep. 257, 69 Wis. 454; *Grimoldby v. Wells*, L. R. 10 C. P. 391.

48. There cannot be a lien if the ownership has not passed to the buyer, for the seller cannot have a lien upon his own goods. 2 *Mechem, Sales*, 1261, § 1474; *Arnold v. Delano*, 58 Mass. 33, 50 Am. Dec. 754, *Ingler, Cas. in Sales*, 174; *Lickbarrow v. Mason*, 6 East, 21.

49. *Safford v. McDonough*, 120 Mass. 290, *Griffin, Illus. Cas. on Pers. Prop.* 105. Symbolical delivery is not sufficient to destroy the lien. *Whelless v. Meyer Co. (Miss.)*, 120 S. W. 708.

1. *Uniform Sales Act*, § 53, (1), (a).

2. If part of the goods have been delivered, the seller can assert his lien on the remainder for the unpaid price of all of the goods. *Ware Co. v. Vibbard*, 114 Mass. 447, *Ingler, Cas. in Sales*, 183; *McElwee v. Metropolitan Co.* 69 Fed. 302, 16 C. C. A. 232, 37 U. S. App. 266; *Dixon v. Yates*, 5 B. & Ad. 313.

ment has been made in full.³

This lien may be lost by a voluntary⁴ delivery of the goods,⁵ by a tender of the price,⁶ or by waiver.⁷ The seller is deemed to have waived his lien when he sells on credit,⁸ or if he assents to a resale of the goods by the

3. *Owens v. Weedman*, 82 Ill. 409; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, 15 Me. 314, 33 Am. Dec. 617; *Hodgson v. Loy*, 7 T. R. 440.

Thus where the buyer paid \$350 of the purchase-price and took six of the sixteen cattle purchased, the seller had a lien on the remaining ten cattle for an unpaid balance of \$50. *Bradley v. Michael*, 1 Ind. 551, *Ingler, Cas. in Sales*, 174.

4. If possession be secured by fraud the lien is not lost; *Ames v. Moir*, 130 Ill. 582; *Leven v. Smith*, 1 Den. 573; *Woolsey v. Axton*, 192 Pa. St. 526; unless the rights of innocent third persons have intervened. 2 *Mechem, Sales*, 1267, § 1490.

5. 2 *Mechem, Sales*, 1264, § 1482; *Blackshear v. Burke*, 74 Ala. 239; *Obermier v. Core*, 25 Ark. 562; *Johnson v. Farnum*, 56 Ga. 144; *McNail v. Ziegler*, 68 Ill. 224; *Slack v. Collins*, 145 Ind. 569; *Holland's Assignee v. Cincinnati Co.*, 97 Ky. 454; *Haskins v. Warren*, 115 Mass. 514, *Ingler, Cas. in Sales*, 185; *Cook v. Perry*, 43 Mich. 629; *Meyers v. McAllister*, 94 Minn. 510; *Thompson v. Conover*, 32 N. J. L. 466; *Brownell Co. v. Barnard*, 116 Mo. 667; *Lupin v. Marie*, 6 Wend. 77, 21 Am. Dec. 256; *McCraw v. Gilmer*, 83 N. Car. 162; *Schmerts v. Dwyer*, 53 Pa. St. 335, *Ingler, Cas. in Sales*, 184; *Boyd v. Moseley*, 32 Tenn. 661; *Lewis v. Steiner*, 84 Tex. 364; *James v. Bird's Adm'r*, 35 Va. (8 Leigh) 510; *Thompson v. Wedge*, 50 Wis. 642; *Gregory v. Morris*, 96 U. S. 619, 24 L. ed. 740; *Valpy v. Bender*, 4 C. B. 837; *Uniform Sales Act*, § 56, (1), (a), (b).

6. 2 *Mechem, Sales*, 1285, § 1522; *Martindale v. Smith*, 1 Q. B. 89.

7. 2 *Mechem, Sales*, 1262, § 1477; *Douglas v. Shumway*, 79 Mass. 499; *Pickett v. Bullock*, 52 N. H. 354; *Benedict v. Field*, 16 N. Y. 595 (taking note of third person); *People's B'k v. Frick Co.*, 18 Okla. 179 (conversion of the goods); *Re Leith's Est.* L. R. 1 P. C. 296 (taking security); *Uniform Sales Act*, § 56, (1), (c).

8. 2 *Mechem, Sales*, 1262, § 1479; *McNail v. Ziegler*, 68 Ill. 224; *Arnold v. Delano*, 58 Mass. 33, 50 Am. Dec. 754, *Ingler, Cas. in Sales*, 174; *McCraw v. Gilmer*, 83 N. Car. 162; *Thompson v. Wedge*, 50 Wis. 642, *Pattee, Illus. Cas. in Personality*, 275; *Leonard v. Davis*, 66 U. S. 476, 17 L. ed. 222; *Horncastle v. Farron*, 3 B. & Ald. 497.

Taking a note payable on demand is not extending credit to the buyer, and the lien is not lost by the seller. *Clark v. Draper*, 19 N. H. 419, *Griffin, Illus. Cas. on Pers. Prop.* 154.

buyer;⁹ but, in a sale on credit, the lien revives if the buyer has not taken possession of the goods before the expiration of the credit;¹⁰ or even sooner than the expiration of the time of credit if the buyer is discovered to be insolvent,¹¹ as there is an implied term in the contract that the buyer shall keep his credit good.¹² A buyer is deemed to be insolvent¹³ within this rule if he has ceased to pay his debts in the ordinary course of business, or apparently cannot pay them as they become due,¹⁴ even though not actually insol-

9. 2 Mechem, Sales, 1273, § 1503; Voorhis v. Olmstead, 66 N. Y. 113; McElwee v. Metropolitan Co., 69 Fed. 302, 16 C. C. A. 232, 37 U. S. App. 266; Stoveld v. Hughes, 14 East, 308.

10. 2 Mechem, Sales, 1284, § 1521; Creanor v. Creanor, 36 Ark. 91; Wade v. Moffett, 21 Ill. 110 74 Am. Dec. 79, Ingler, Cas. in Sales, 181; Jeckell v. Fried, 69 La. (18 La. Ann.) 192; Milliken v. Warren, 57 Me. 46; Ware Co. v. Vibbard, 114 Mass. 447; Clark v. Draper, 19 N. H. 419, Griffin, Illus. Cas. in Pers. Prop. 154; Johnson v. Dickinson, 78 N. Y. 72; White v. Welsh, 32 Pa. St. 396; Robinson v. Morgan, 65 Vt. 37; Leahy v. Lohdell, 80 Fed. 665, 26 C. C. A. 75, 54 U. S. App. 35; New v. Swain, 1 Dans. & L. 193; Uniform Sales Act, § 54 (b.)

11. 2 Mechem, Sales, 1280, § 1510; Owens v. Weedman, 82 Ill. 409; Rappleye v. Racine Co., 79 Iowa, 220, 7 L. R. A. 139; Milliken v. Warren, 57 Me. 46; Thompson v. Baltimore Co., 28 Md. 396; Crummev v. Raudenbush, 55 Minn. 426, Ingler, Cas. in Sales, 179; Hunter v. Talbot, 11 Miss. 754; Southwestern Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Tuthill v. Skidmore, 124 N. Y. 148, Ingler, Cas. in Sales 177; Diem v. Koblitz, 49 Ohio St. 41, 34 Am. St. 531, Ingler, Cas. in Sales, 187; Wanamaker v. Yerkes, 70 Pa. St. 443; Arnold v. Carpenter, 16 R. I. 560, 5 L. R. A. 357; Robinson v. Morgan, 65 Vt. 37; Bohn Co. v. Hynes, 83 Wis. 388; Parker v. Byrnes, 1 Lowell, 539; Bloxam v. Sanders, 4 B. & C. 914, Griffin, Illus. Cas. on Pers. Prop. 141, Ingler, Cas. in Sales, 180.

12. Arnold v. Delano, 58 Mass. 33, 50 Am. Dec. 754, Ingler, Cas. in Sales, 174.

13. 2 Mechem, Sales, 1284, § 1519; Uniform Sales Act, § 54 (c.)

14. Atwater v. Bank, 152 Ill. 605; Secomb v. Nutt, 53 Ky. 324; O'Brien v. Norris, 16 Md. 122, 77 Am. Dec. 284; Durgy Co. v. O'Brien, 123 Mass. 12 (note protested); More v. Lott, 13 Nev. 376, (well founded rumors); Reynolds v. Railroad Co., 43 N. H. 580 (suspicious acts); Hays v. Mouille, 14 Pa. St. 48 (attachment proceedings); Bloomington v. Memphis Co., 74 Tenn. 616; Chandler v. Fulton, 10 Tex. 2; Jeffris v. Fitchburg Co., 93 Wis. 250, 57 Am. St. 919, 33 L. R. A. 351; Biddlecombe v. Bond, 4 A. & E. 322.

vent;¹⁵ and he is not insolvent merely because he might not be able to pay all claims owing by him if all were presented at one time.¹⁶ Recovery of a judgment by the seller against the buyer for the price does not affect the seller's lien.¹⁷

§ 184. Remedies of Seller as to the Goods—Stoppage in Transitu. Another important remedy¹⁸ possessed by the unpaid seller¹⁹ is the right of stoppage *in transitu*,²⁰ that is, a right to prevent delivery to the buyer while the goods are in the possession of a carrier,²¹ or other bailee,²² in transit to the

15. *Crummey v. Raudenbush*, 55 Minn. 426, Ingler, Cas. in Sales, 179; *Tuthill v. Skidmore*, 124 N. Y. 148; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. 531.

16. *Millard v. Webster*, 54 Conn. 415.

17. *Woodland Co. v. Mendenhall*, 82 Minn. 483, 83 Am. St. 445; *Cragin v. O'Connell*, (N. Y.) 50 App. Div. 339, aff'd 169 N. Y. 573; *Houlditch v. Desanges*, 2 Stark, 337, Ingler, Cas. in Sales, 186; Uniform Sales Act, § 56 (2.)

18. Uniform Sales Act, § 57.

19. The expression "unpaid seller" is a broad one; Uniform Sales Act, § 52 (2); including a factor who has bought goods for his principal; 2 Mechem, Sales, 1290, § 1530; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489, Ingler, Cas. in Sales, 176; *Seymour v. Newton*, 105 Mass. 272; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *Feise v. Wray*, 2 East, 93; and a person who pays the price for the buyer and takes an assignment of the bill of lading as security. 2 Mechem, Sales, 1290, § 1531; *Gossler v. Schepeler*, 5 Daly, 476.

The fact that part payment has been made does not prevent stoppage of all of the goods. *Haven v. Place*, 28 Minn. 551; *Atkins v. Colby*, 20 N. H. 154; *Jordan v. Jones*, 5 Ohio, 88; *Howatt v. Davis*, 19 Va. (5 Munf.) 34, 7 Am. Dec. 681; *Hodgson v. Loy*, 7 T. R. 440.

20. 2 Mechem, Sales, 1286, § 1525; *Mason v. Wilson*, 43 Ark. 172; *Frame v. Orgeon Co.*, 48 Ore. 272; *Parker v. McIver*, 1 Dessaus. Eq. 281.

21. A log driving company moving logs down a river from seller to buyer, is regarded as a carrier. *Johnson v. Eveleth*, 93 Me. 306, 45 Atl. 35, 43 L. R. A. 50.

22. Thus the goods can be stopped while in the possession of a warehouseman if such possession is one step in the process of transferring the goods from the seller to the buyer. *Symns v. Schotten*, 35 Kans. 310, Ingler, Cas. in Sales, 191; *Thompson v. Baltimore Co.*, 28 Md. 396; *Keeler v. Goodwin*, 111 Mass. 490; *Conrad v. Fisher*, 37

buyer,²³ although the price is not yet due;²⁴ and to resume possession. In order to possess this right it is essential that the buyer be actually²⁵ or apparently²⁶ insolvent, and that the seller learn of this insolvency for the first time after the goods have left the possession of the seller.²⁷

Mo. App. 352, 3 L. R. A. 147; *Covell v. Hitchcock*, 23 Wend. 611; *Re Batchelder*, 2 Lowell, 245.

23. 2 Mechem, Sales, 1297, § 1545; *Rowley v. Bigelow*, 29 Mass. 307, 23 Am. Dec. 607; *Klingman v. Denison*, 84 Mich. 608, 22 Am. St. 711, 11 L. R. A. 347, *Griffin*, Illus. Cas. on Pers. Prop. 161; *Becker v. Hallgarten*, 86 N. Y. 167; *Guilford v. Smith*, 30 Vt. 49; *Biggs v. Barry*, 2 Curt. 259; *Wiley v. Smith*, 2 Can. 1. The transit begins as soon as the goods are in possession of the bailee although not yet in motion; as in the case of goods loaded upon a ship which has not left its dock. *Wiseman v. Vandeputt*, 2 Vern. 203.

24. *Rogers v. Schneider*, 13 Ind. App. 23; *Clapp v. Peck*, 55 Iowa, 270; *Newhall v. Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Stubbs v. Lund*, 7 Mass. 453; *Atkins v. Colby*, 20 N. H. 154; *Babcock v. Bonnell*, 80 N. Y. 244, *Griffin*, Illus. Cas. on Pers. Prop. 158; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. 531; *Bell v. Moss*, 5 Whart. 189.

25. *Re Darlington Co.*, 163 Fed. 385.

26. 2 Mechem, Sales, 1294, § 1539; *Secomb v. Nutt*, 53 Ky. 324; *Tuthill v. Skidmore*, 124 N. Y. 148; *Bloomington v. Memphis Co.*, 74 Tenn. 616; *Jeffris v. Fitchburg Co.*, 93 Wis. 250, 57 Am. St. 919, 33 L. R. A. 351. See *ante*, § 183. If the buyer is not actually or apparently insolvent the seller has no right to stop the goods. *Benedict v. Schaettle*, 12 Ohio St. 515; *Fraser v. Witt*, L. R. 7 Eq. 64; 2 Mechem, Sales, 1296, § 1541.

27. It is immaterial whether the buyer became insolvent before or after delivery to the carrier provided the seller acquires his knowledge thereafter. *Bayonne Co. v. Umbenhauer*, 107 Ala. 496, 54 Am. St. 114; *Blum v. Marks*, 72 La. (21 La. Ann.) 268, 99 Am. Dec. 725; *O'Brien v. Norris*, 16 Md. 122, 77 Am. Dec. 284; *Kingman v. Denison*, 84 Mich. 608, 22 Am. St. 711, 11 L. R. A. 347, *Griffin*, Illus. Cas. on Pers. Prop. 161; *Crummey v. Raudenbush*, 55 Minn. 426, 428, *Inglar*, Cas. in Sales, 179; *Welsh v. Blakely*, 6 Mont. 194; *Reynolds v. B. & M. R. R.*, 43 N. H. 580; *Farrell v. Richmond Co.*, 102 N. Car. 390, 11 Am. St. 760, 3 L. R. A. 647; *The Constantia*, 6 C. Rob. 321.

If the seller, when he parted with possession of the goods, knew of the insolvency of the buyer, the goods cannot be stopped. 2 Mechem, Sales, 1296, § 1542; *Garden Co. v. Missouri R'y*, 64 Mo. App. 305; *Fenkhausen v. Fellows*, 20 Nev. 312, 4 L. R. A. 732; *Buckley v. Furniss*, 15 Wend. 137; *Benedict v. Schaettle*, 12 Ohio St. 515; *H. & T. R'y v.*

The right is exercised by the seller giving notice to the carrier²⁸ or by the seller taking actual possession of the goods. When notice is given to the carrier it may be to the person in actual custody²⁹ or to his principal;³⁰ but in the latter case the notice must be given in sufficient time to allow for its communication to the person in actual custody.³¹ The law does not require any formality³² in the notice;³³ but the goods must be described sufficiently to enable them to be identified.³⁴ The carrier must comply with the notice as soon as he is satisfied that it is made by the seller,³⁵ the liability for wrongful stoppage being upon the seller.³⁶

As soon as the seller, after exercising his right of stoppage, acquires possession of the goods from the carrier, he is in the same position legally as if he never had parted with possession.³⁷ The contract of sale is

Poole, 63 Tex. 246. The seller, in such a case, is at fault in parting with the goods.

28. Rucker v. Donovans, 13 Kans. 251, 19 Am. Rep. 84; Newhall v. Vargas, 13 Me. 93, 29 Am. Dec. 489; O'Brien v. Norris, 16 Md. 122; Seymour v. Newton, 105 Mass. 272; Reynolds v. Boston Co., 49 N. H. 530, Mottram v. Heyer, 5 Den. 629; Litt v. Cowley, 7 Taunt. 168.

29. Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338, Ingler, Cas. in Sales, 200.

30. 2 Mechem, Sales, 1333, § 1609; Uniform Sales Act, § 59 (1.)

31. Mottram v. Heyer, 5 Den. 629; Whitehead v. Anderson, 9 M. & W. 518.

32. Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338, Ingler, Cas. in Sales, 200; Rucker v. Donovan, 13 Kans. 251, 19 Am. Rep. 84.

33. 2 Mechem, Sales, 1337, § 1606.

34. Allen v. Maine Co., 79 Me. 327, 1 Am. St. 310; Clementson v. Grand T. Co., 42 Up. Can. Q. B. 263.

35. Jones v. Earl, 37 Cal. 630, 99 Am. Dec. 338, Ingler, Cas. in Sales, 200; Allen v. Maine Co., 79 Me. 327, 1 Am. St. 310; The Vidette, 34 Fed. 396; Ascher v. Grand T. Co., 36 U. C. Q. B. 609; Uniform Sales Act, § 59 (2.)

36. More v. Lott, 13 Nebr. 376; Benedict v. Schaettle, 12 Ohio St. 515; The Constantia, 6 C. Rob. 321.

37. 2 Mechem, Sales, 1339, § 1611; Newhall v. Vargas, 15 Me. 314, 33 Am. Dec. 617; McGill v. Lumber Co., 111 Tenn. 552; Wentworth v. Outhwaite, 10 M. & W. 426.

not rescinded,³⁸ the seller's lien revives,³⁹ and the buyer is entitled to the goods upon payment of the amount due.⁴⁰

The right of stoppage is terminated as soon as the buyer takes delivery,⁴¹ even though it be at an intermediate point.⁴²

38. 2 Mechem, Sales, 1239, § 1612; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. 531; *Patten's App.* 49 Pa. St. 151, *Ingler, Cas. in Sales*, 205.

39. *Rucker v. Donovan*, 13 Kans. 251, 19 Am. Rep. 84; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Sheppard v. Newhall*, 54 Fed. 306, 4 C. C. A. 352, 7 U. S. App. 544.

40. 2 Mechem, Sales, 1346, § 1628; *Rogers v. Thomas*, 20 Conn. 53; *McElroy v. Seerey*, 61 Md. 389, 48 Am. Rep. 110; *Grout v. Hill*, 70 Mass. 361; *Chandler v. Fuller*, 10 Tex. 2; *Wart v. Scott*, 6 Grant Ch. 154.

41. *Muskegon Co. v. Underhill*, 43 Mich. 629; *Langstaff v. Stix*, 64 Miss. 171, *Ingler, Cas. in Sales*, 192; *Lewis v. Mason*, 36 Up. Can. Q. B. 590.

If part of the goods have been delivered to the buyer, the remainder can be stopped. *Secomb v. Nutt*, 53 Ky. 324; *Buckley v. Furniss*, 17 Wend. 504; *Jeffris v. Fitchburg Co.*, 93 Wis. 250, 57 Am. St. 919, 33 L. R. A. 351; *McElwee v. Metropolitan Co.*, 69 Fed. 302, 16 C. C. A. 232, 37 U. S. App. 266; *Dixon v. Yates*, 5 B. & Ad. 313.

42. 2 Mechem, Sales, 1303, § 1556; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17, *Pattee, Illus. Cas. in Personalty*, 394; *Branan v. Atlanta Co.*, 108 Ga. 70, 75 Am. St. 26; *Secomb v. Nutt*, 53 Ky. 324; *Mohr v. Boston Co.*, 106 Mass. 72; *Reynolds v. B. & M. Railroad*, 43 N. H. 580; *Harris v. Pratt*, 17 N. Y. 249, *Ingler, Cas. in Sales*, 192; *Cabeen v. Campbell*, 30 Pa. St. 254; *Poole v. Houston Co.* 53 Tex. 134; *Eaton v. Cook*, 32 Vt. 58; *Mills v. Ball*, 2 B. & P. 457.

If the seller delivers to the buyer a bill of lading for the goods, an indorsement of the bill of lading to a third person who buys in good faith and pays value, is the only way the right of stoppage can be defeated before actual possession is taken by or on behalf of the buyer. 2 Mechem, Sales, 1307, § 1563; *Loeb v. Peters*, 63 Ala. 243, 35 Am. Rep. 17, *Pattee, Illus. Cas. in Personalty*, 394; *Newhall v. Central Co.*, 51 Cal. 345, 21 Am. Rep. 713; *First B'k v. Schmidt*, 6 Colo. App. 216; *Branan v. Atlanta Co.*, 108 Ga. 70, 75 Am. St. 26; *Canadian B'k v. McCrea*, 106 Ill. 231; *Pattison v. Culton*, 33 Ind. 240, 5 Am. Rep. 199; *Clapp v. Sohmer*, 55 Iowa, 273; *Lee v. Kimball*, 45 Me. 172; *National B'k v. Railroad*, 99 Md. 661, 105 Am. St. 321; *Stanton v. Eager*, 33 Mass. 467; *Becker v. Hallgarten*, 36 N. Y. 167; *Bell v. Moss*, 5 Whart. 205; *Chandler v. Fulton*, 10 Tex. 2; *Lesassier v. The Southwestern*,

§ 185. Remedies of Seller as to the Goods—Resale. A third remedy which the unpaid seller has, in event of the insolvency of the buyer, is the right to resell the goods,⁴³ provided it is exercised fairly and in good faith.⁴⁴

§ 186. Remedies of Seller against Buyer Personally. After the ownership of goods has passed to the buyer and the time of credit, if any, has expired,⁴⁵ or if the price is payable on a day certain,⁴⁶ the seller can bring an action for the price.⁴⁷

If the ownership has not passed and the goods have not been delivered, the buyer wrongfully refusing to accept them, the remedy of the seller is to recover damages for breach of the contract,⁴⁸ the measure of dama-

2 Woods, 35; *Clementson v. Grand Co.*, 42 Up. Can. Q. B. 273; *Lickbarrow v. Mason*, 2 T. R. 63, 1 H. Bl. 357, 2 H. Bl. 211, 5 T. R. 683. See, also, *Shepard Co. v. Burroughs*, 62 N. J. L. 469.

43. 2 Mechem, Sales, 1343, § 1622; *Bell v. Offutt*, 73 Ky. 632; *Atwood v. Lucas*, 53 Me. 508, 89 Am. Dec. 713; *Young v. Mertens*, 27 Md. 114; *Putnam v. Glidden*, 159 Mass. 47, 38 Am. St. 394; *Van Horn v. Rucker*, 33 Mo. 391, 84 Am. Rep. 52; *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. 692; *Arnold v. Carpenter*, 16 R. I. 560, 5 L. R. A. 357; *Phelps v. Hubbard*, 51 Vt. 489; *Uniform Sales Act*, § 60.

44. *Penn v. Smith*, 98 Ala. 560; *Camp v. Hamlin*, 55 Ga. 259; *Saladin v. Mitchell*, 45 Ill. 79; *Brownlee v. Bolton*, 44 Mich. 218; *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. 728, 53 L. R. A. 867; *Langton v. Higgins*, 28 L. J. Exch. 252, 4 H. & N. 402.

45. 2 Mechem, Sales, 1364, § 1663; *Dellone v. Hull*, 47 Md. 112; *Keller v. Strasberger*, 90 N. Y. 379; *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322, 328.

46. *Burnley v. Tufts*, 66 Miss. 48; *Dunlop v. Grote*, 2 C. & K. 153; *Ingler, Cas. in Sales*, 211; *Uniform Sales Act*, § 63 (2.)

47. 2 Mechem, Sales, 1362, § 1658; *Wade v. Moffett*, 21 Ill. 110, *Ingler, Cas. in Sales*, 181; *Mitchell v. LeClair*, 165 Mass. 308; *Meagher v. Cowing*, 149 Mich. 416; *Wood v. Michaud*, 63 Minn. 478; *Doremus v. Howard*, 23 N. J. L. 390; *Ganson v. Madigan*, 18 Wis. 67, 15 Wis. 144, 82 Am. Dec. 659; *Uniform Sales Act*, § 63. If the goods have not been delivered, the action is for "goods bargained and sold;" but if delivery has been made, the action is for "goods sold and delivered." 2 Mechem, Sales, 1361, § 1653.

48. 2 Mechem, Sales, 1372, § 1684; *Allen v. Jarvis*, 20 Conn. 49; *Brand v. Henderson*, 107 Ill. 141, *Ingler, Cas. in Sales*, 212; *Atwood v.*

ges usually being the difference between the amount the buyer agreed to pay and the market value at the time when and place⁴⁹ where the contract should have been performed,⁵⁰ provided the market value is lower than the contract price, as that would be the amount of obligation which the buyer has failed to fulfill; for with the amount which the seller can receive for his goods in mar-

Lucas, 53 Me. 508, 89 Am. Dec. 713; Collins v. Delaporte, 115 Mass. 159; McCormick Co. v. Balfang, 78 Minn. 370; Zwislser v. Storts, 30 Mo. App. 163; Madison Co. v. Osler (Mont.), 102 Pac. 325; Gordon v. Norris, 49 N. H. 376; Butler v. Butler, 77 N. Y. 472; Jones v. Jennings, 168 Pa. St. 493; Danforth v. Walker, 37 Vt. 239; James v. Adams, 16 W. Va. 245; Ganson v. Madigan, 15 Wis. 144, 82 Am. Dec. 659; Atkinson v. Bell, 8 B. & C. 277, Ingler, Cas. in Sales, 211; Uniform Sales Act, § 64 (1.)

Logically the seller cannot recover the price for goods which are his own; but in many jurisdictions he is allowed to recover the price even in such a case. Magnes v. Sioux Co., 14 Colo. App. 519; Darby v. Hall, 3 Pennew. 25; Osgood v. Skinner, 211 Ill. 229; Dwiggins v. Clark, 94 Ind. 49, 48 Am. Rep. 140; Moline Co. v. Reed, 52 Iowa, 307, 35 Am. Rep. 272; Bell v. Offutt, 73 Ky. 632; Black Co. v. Warner, 93 Mo. 374; Cragin v. O'Connell, 50 App. Div. 339, 169 N. Y. 573; Shawhan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Haynes v. Brown, 18 Okla. 389; Smith v. Wheeler, 7 Oreg. 49, 33 Am. Rep. 698; Ballentine v. Robinson, 46 Pa. St. 177; Pratt v. Freeman Co., 115 Wis. 648.

49. 2 Mechem, Sales, 1374, § 1690; Harris Co. v. Marsh, 49 Iowa, 11; Young v. Merton, 27 Me. 114; Clement Co. v. Meserole, 107 Mass. 362; Northup v. Cook, 39 Mo. 208; Rand v. White Co., 40 N. H. 79; Whelan v. Lynch, 65 Barb. 329, 60 N. Y. 469; Nixon v. Nixon, 21 Ohio St. 114; Lanbach v. Lanbach, 73 Pa. St. 392; Danforth v. Walker, 37 Vt. 239; Gibbons v. U. S. 75 U. S. 269. If there is no market at that place, then the value at the nearest market available, less the cost of transportation. 2 Mechem, Sales, 1375, § 1690; Barray v. Cavanagh, 127 Mass. 394; McCormick v. Hamilton, 64 Va. (23 Gratt.) 561; Chicago v. Greer, 76 U. S. 726, 19 L. ed. 769.

If the market price equals or exceeds the contract price, nominal damages only can be recovered. Foos v. Sabin, 84 Ill. 564; Furniture Co. v. Board of Education, 55 N. J. L. 646.

50. Tahoe Co. v. Union Co., 109 Cal. 242; Hassell W'ks v. Cohen, 36 Colo. 353; Murray v. Doud, 167 Ill. 368, 59 Am. St. 297; Pittsburgh Co. v. Heck, 50 Ind. 303, 19 Am. Rep. 713; Lawrence Co. v. Mercantile Co., 5 Kans. App. 77; Kellogg v. Frohlich, 139 Mich. 612; Funke v. Allen, 54 Nebr. 407, 69 Am. St. 716; Huguenot Mills v. Jempson, 63 S. Car. 363, 102 Am. St. 673; Scott Co. v. Mfg. Co., 91 Wis. 667; Philpots v. Evans, 5 M. & W. 475; Uniform Sales Act, § 64 (2.)

ket added to such difference recovered, the seller is in the same position financially as if he had been paid.⁵¹

§ 187. **Sales—Remedies of Buyer—Measure of Damages in General.** If the seller wrongfully refuses to deliver in accordance with his contract, the buyer can bring an action for its breach,¹ the measure of damages being the difference between the contract price and the market value at the time and place of the breach of contract² if such value be higher than the contract price; for with the difference and the amount he agreed to pay, he can procure goods in the market³ without any loss to himself.

51. *Kingman v. Hanna Co.*, 176 Ill. 547; *Barrow v. Arnaud*, 3 Q. B. 595.

1. 2 *Mechem, Sales*, 1430, § 1784; *Uniform Sales Act*, § 67 (1.)

2. 2 *Mechem, Sales*, 1404, § 1736; *Hanna v. Harter*, 2 Ark. 397; *Crosby v. Watkins*, 12 Cal. 85; *Capen v. De Steiger Co.*, 105 Ill. 185; *Rahm v. Dieg*, 121 Ind. 283; *Gray v. Hall*, 29 Kana. 704; *Miles v. Miller*, 75 Ky. 134; *Marchesseau v. Chaffee*, 55 La. (4 La. Ann.) 24; *Bush v. Holmes*, 53 Me. 417; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. 415; *Somers v. Wright*, 115 Mass. 292; *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. 350; *Hewson-Herzog Co. v. Minn. Co.*, 55 Minn. 530; *White v. Salisbury*, 33 Mo. 150; *Gordon v. Norris*, 49 N. H. 376; *Dana v. Fiedler*, 12 N. Y. 46, 62 Am. Dec. 130; *Smith v. Lime Co.*, 57 Ohio St. 518; *Doak v. Snapp*, 41 Tenn. 180; *Guice v. Crenshaw*, 60 Tex. 344; *Hill v. Smith*, 34 Vt. 535; *Hill v. Chapman*, 59 Wis. 211; *Uniform Sales Act*, § 67 (3.)

If there is no market price at the place of delivery, the market value is ascertained by adding to the market price at the nearest available market, the cost of transportation therefrom. *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *Marshall v. Clark*, 78 Conn. 9, 112 Am. St. 84, *Ford v. Lawson*, (Ga.) 65 S. E. 444; *Kitzinger v. Sanborn*, 70 Ill. 149; *Vickery v. McCormick*, 117 Ind. 594; *Furlong v. Polleys*, 30 Me. 491, 1 Am. Rep. 635; *National Co. v. Gaslight Co.*, 189 Mass. 284; *Graham v. Frazier*, 49 Nebr. 90; *Douglass v. Merceles*, 25 N. J. Eq., 144; *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Young v. Lloyd*, 65 Pa. St. 199; *Nottingham Co. v. Preas*, 102 Va. 820; *Grand Co. v. Phillips*, 90 U. S. 471, 23 L. ed. 71.

If the market value is unnaturally inflated, it is not a true test. *Kounts v. Kirkpatrick*, 72 Pa. St. 376, 13 Am. Rep. 687.

3. *Laporte Co. v. Brock*, 99 Iowa, 485, 61 Am. St. 245; *Willock v. Oil Co.*, 134 Pa. St. 245; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139; *Barrow v. Arnaud*, 3 Q. B. 595.

If the buyer has paid the seller the price, the measure of damages is the value of the goods,⁴ and not the price paid; as with the amount of their value the buyer can buy goods in market, and thus place himself in the same position as if the seller had made delivery. The fact that he has paid the seller more or less than the goods are worth is immaterial.

§ 188. Sales—Remedies of Buyer—Nominal Damages. If the market value equals, or is below, the contract price,⁵ or if the contract did not fix a price, the buyer can recover nominal but not substantial damages, as in the latter case the law implies a reasonable price, that is, the market price,⁶ so that the buyer can furnish himself with goods in open market without loss.

§ 189. Sales—Remedies of Buyer—Special Damage. If the buyer had in view a special or unusual use or purpose which was made known⁷ to the seller, so that

4. 2 Mechem, Sales, 1407, § 1741; Dabovich v. Emeric, 12 Cal. 171; West v. Pritchard, 19 Conn. 212; Deere v. Lewis, 51 Ill. 254; Kent v. Ginten, 23 Ind. 1; Meyer v. Wheeler, 65 Iowa, 390; Balto. Co. v. Sewell, 35 Md. 238; White v. Salisbury, 33 Mo. 150; Winside B'k v. Lound, 52 Nebr. 469; Arnold v. Suffolk B'k, 27 Barb. 424; Smethurst v. Woolston, 5 Watts & S. 106; Ranger v. Hearne, 37 Tex. 30; Humphreysville Co. v. Vermont Co., 33 Vt. 92; Shepherd v. Hampton, 16 U. S. 200; Startup v. Cortazzi, 2 C. M. & R. 165.

5. Rose v. Bozeman, 41 Ala. 678; Bush v. Canfield, 2 Conn. 485; Deere v. Lewis, 51 Ill. 254; Wire v. Foster, 62 Iowa, 114; McGrath v. Gegner, 77 Md. 331; Billings v. Vanderbeck, 23 Barb. 546; Fessler v. Love, 48 Pa. St. 407; Merriman v. Machine Co., 96 Wis. 600; Moses v. Rasin, 14 Fed. 772; Valpy v. Oakeley, 16 Q. B. 941.

6. Trunkey v. Hedstrom, 131 Ill. 204; McGrath v. Cannon, 55 Minn. 457.

7. If the purpose was not known to the seller at the time the contract was made, special damage to the buyer could not be expected directly and naturally to result from the seller's breach of the contract. Penn v. Smith, 104 Ala. 445; Jordan v. Patterson, 67 Conn. 478; Orr v. Farmers' Co., 97 Ga. 241; Goodkind v. Rogan, 8 Ill. App. 413; Coffin v. State, 144 Ind. 578; Barker v. Mann, 68 Ky. 672, 96 Am. Dec. 373; Mihills Co. v. Day, 50 Iowa, 250; South Co. v. Bradstreet, 97 Me. 165; Bartlett v. Blanchard, 79 Mass. 429; Wetmore v. Pattison, 45 Mich. 439; Paine v. Sherwood, 19 Minn. 315 (Gil. 270); Devlin v. New

non-delivery of the goods occasions a loss to the buyer in excess of the ordinary damages recoverable, the buyer can recover special damages to compensate him for such loss.⁸ Thus if the buyer was procuring the goods for the purpose of reselling⁹ them, which fact was known to the seller at the time the contract was entered into, the buyer could recover the profits which he would have made if the goods had been delivered.

Damages, however, cannot be recovered by the buyer for purely conjectural, speculative or remote losses.¹⁰ Thus, he cannot recover for profits which he contends he *might* have received upon contracts which he *might* have made.¹¹

York, 63 N. Y. 3; Billmeyer v. Wagner, 91 Pa. St. 92; Copper Co. v. Copper Co., 23 Vt. 92; Cockburn v. Ashland Co. 54 Wis. 619; Peace Co. v. Grafflin, 58 Fed. 550; Cory v. Building Co., L. R. 3 Q. B. 181, 87 L. J. Q. B. 68.

8. Bell v. Reynolds, 78 Ala. 511; Richner v. Plateau Co. (Colo.), 98 Pac. 178; Richmond v. Dubuque Co., 40 Iowa, 264, 43 Iowa, 422; Fairchild v. Rogers, 32 Mo. 269; Watson v. Needham, 161 Mass. 404, 24 L. R. A. 287; Morrison v. Lovejoy, 6 Minn. 224; McHose v. Fulmer, 73 Pa. St. 365; Jones v. George, 61 Tex. 345; Royalton v. Royalton Co., 14 Vt. 311; Kindall Co. v. Commissioners, 79 Va. 338 U. S. v. Speed, 75 U. S. 77. In Hammer v. Schoenfelder, 47 Wis. 455, the seller was liable for damage resulting to the buyer from meat spoiling in consequence of the seller's failure to supply the ice contracted for, the buyer being a butcher and the seller being aware of the circumstances.

9. 2 Mechem, Sales, 1418, § 1763; Jordan v. Patterson, 67 Conn. 473; Robinson v. Hyer, 35 Fla. 544; Thorne v. McVeagh, 75 Ill. 81, Ingler, Cas. in Sales, 235; Stewart v. Power, 12 Kans. 596; Campbellville Co. v. Bradlee, 96 Ky. 494; Industrial W'ks v. Mitchell, 114 Mich. 29; Messmore v. New Y. Co., 40 N. Y. 422, Ingler, Cas. in Sales, 232; Lilly v. Lilly, 39 Wash. 337; Guetzkow v. Andrews, 92 Wis. 214; Elbinger Actien-Gesellschaft v. Armstrong, L. R. 9 J. B. 473.

10. Brigham v. Carlisle, 78 Ala. 243; Ferris v. Comstock, 33 Conn. 513; Hill v. Parsons, 110 Ill. 107; Howe Co. v. Bryson, 44 Iowa, 159; Paola Co. v. Paola Co, 56 Kans. 614, 54 Am. St. 593; Berger v. New Orleans, 86 La. (35 La. Ann.) 523; Noble v. Hand, 163 Mass. 239; McKinnon v. McEwan, 48 Mich. 106; Wolcott v. Mount, 36 N. J. L. 262, 38 N. J. L. 494; Withersbee v. Meyer, 155 N. Y. 446; Pennypacker v. Jones, 106 Pa. St. 237; Houston Co. v. Hill, 63 Tex. 381; Lawrence v. Porter, 63 Fed. 62.

11. 2 Mechem, Sales, 1427, § 1777.

§ 190. **Sales—Remedies of Buyer—Specific Performance.** Sometimes the buyer can go into a court of equity and have specific performance¹² of the seller's contract, that is, can compel the seller to deliver the goods; but, to entitle him to this remedy, the article must be unique, such as a work of art,¹³ or valuable for sentimental¹⁴ reasons, or of particular importance;¹⁵ and the circumstances must be such that a judgment for damages in a court of common law would not be adequate.¹⁶

§ 191. **Sales—Remedies of Buyer—Trover.** If title to the goods has passed to the buyer, he has a right to maintain an action of trover¹⁷ as for conversion against the seller who wrongfully refuses to deliver them or re-sells¹⁸ them.

12. *Brady v. Yost*, 6 Ida. 273; *Parker v. Garrison*, 61 Ill. 250; *Murphy v. Clark*, 9 Miss. 221; *Pattison v. Skillman*, 34 N. J. Eq. 344; *Young v. Burton*, McMull. Eq. 255; *Womack v. Smith*, 30 Tenn. 478, 54 Am. Dec. 51; *Summers v. Bean*, 54 Va. (13 Gratt.) 404; *Hull v. Pitrat*, 45 Fed. 94 (a patented article); *Uniform Sales Act*, § 68.

13. 2 Mechem, Sales, 1396, § 1719; *Lowther v. Lowther*, 13 Ves. 95 (a painting by Titian).

14. *Wilkinson v. Stitt*, 175 Mass. 581 (prize cup); *Williams v. Howard*, 7 N. Car. 74; *Onondaga Nation v. Thacher*, 53 App. Div. 561, aff'd 169 N. Y. 584 (belts of wampum); *Pusey v. Pusey*, Vern. 273 (Pusey horn).

15. 2 Mechem, Sales, 1397, § 1720; *Buxton v. Cooper*, 3 Atk. 332, 335. Thus where the seller has agreed to supply coal-tar which is indispensable to the business of the buyer, and which the latter cannot procure elsewhere, specific performance of the agreement will be enforced. *Equitable Co. v. Baltimore Co.*, 63 Md. 285. Contracts for the sale of corporate stocks sometimes will be enforced specifically. 2 Mechem, Sales, 1400, § 1727; *Frue v. Houghton*, 6 Colo. 318; *New Eng. Co. v. Abbott*, 162 Mass. 143, 27 L. R. A. 271; *Williams v. Montgomery*, 143 N. Y. 519; *Northern Co. v. Walworth*, 193 Pa. St. 207; *Manton v. Ray*, 18 R. I. 672, 49 Am. St. 811, 19 R. I. 433; *Bumgardner v. Leavitt*, 35 W. Va. 194.

16. 2 Mechem, Sales, 1398, § 1724; *Gottschalk v. Stein*, 69 Md. 51.

17. 2 Mechem, Sales, 1431, § 1736; *Zwisler v. Storts*, 30 Mo. App. 163; *Uniform Sales Act*, § 66.

18. *Philbrook v. Eaton*, 134 Mass 392.

§ 192. Sales—Remedies of Buyer—Delay in Delivery. If the goods have been delivered, but there was delay in the delivery, the buyer is entitled to such damages as he may have sustained by reason thereof.¹⁹

§ 193. Sales—Remedies of Buyer—Breach of Warranty. If the buyer bring an action for breach of warranty of kind, quality or condition, the measure of damages is the difference between the value of the article if the warranty had not been broken and the value of the article as it is;²⁰ and the fact that he has not paid a note given in payment,²¹ or that he bought for a low price,²² or has made a profit by a resale,²³ does not prevent recovery, for his profit would have been larger if

19 2 Mechem, Sales, 1434, § 1790.

20. 2 Mechem, Sales, 1451, § 1817; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Murray v. Meredith*, 25 Ark. 164; *Shearer v. Park Co.*, 103 Cal. 415, 42 Am. St. 125; *Meyer v. Green*, 21 Ind. App. 138, 69 Am. St. 344; *Wheeler Co. v. Thompson*, 33 Kans. 491; *Sharpe v. Bettis*, 17 Ky. Law Rep. 673; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Central Co. v. Arctic Co.*, 77 Md. 202; *Maxted v. Fowler*, 94 Mich. 106; *Stillwell v. Canning Co.*, 78 Miss. 779; *McCormick Co. v. Heath*, 65 Mo. App. 461; *Burr v. Redhead*, 52 Nebr. 617; *Fisk v. Hicks*, 31 N. H. 538; *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425; *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309; *Aultman v. Ginn*, 1 N. Dak. 402; *Western Co. v. Wright*, 11 S. Dak. 521, 44 L. R. A. 438; *Reese v. Miles*, 99 Tenn. 398; *Danner v. Ft. Worth Co.*, 18 Tex. Civ. App. 621; *Eastern Co. v. King*, 86 Va. 97; *McDonald v. Kans. Co.*, 149 Fed. 360 79 C. C. A. 298, 8 L. R. A. N. S. 1110; *Clare v. Maynard*, 7 C. & P. 741, 32 Eng. Com. Law, 713; Uniform Sales Act, § 69 (7).

21. 2 Mechem, Sales, 1464, § 1836; *Applebee v. Rumery*, 28 Ill. 280; *Fitzpatrick v. Osborne*, 50 Minn. 261.

22. If the buyer purchased at a low price, he is entitled to the benefit of his bargain. *Murray v. Jennings*, 42 Conn. 9; *Wallace v. Wron*, 32 Ill. 151; *Douglass v. Moses*, 89 Iowa, 40; *Cothers v. Keever*, 4 Pa. St. 168.

23. *Atkins v. Cobb*, 56 Ga. 86; *Wheelock v. Berkeley*, 138 Ill. 153, *Ingler, Cas. in Sales*, 229; *Brown v. Bigelow*, 92 Mass. 242, *Ingler, Cas. in Sales*, 229; *Miamisburg Co. v. Wohlhuter*, 71 Minn. 484; *Hogan v. Shuart*, 11 Mont. 498; *Muller v. Eno*, 14 N. Y. 597; *Brock v. Clark*, 60 Vt. 551. It is immaterial whether he has resold the goods or not. *Case Wks v. Niles*, 90 Wis. 590.

the article had been as warranted. If the buyer is sued for the price he may recoup²⁴ for a breach of warranty, even, sometimes, to the complete extinction²⁵ of the seller's claim.

§ 194. **Exchanges.** An Exchange, or barter, is a transfer of property in consideration of other property²⁶ not based on a money value.²⁷ If the parties place a value upon property mutually transferred, and the transaction is based thereon, it is technically not an exchange,²⁸ but two sales. Thus, giving two sheep for one cow would be an exchange; but if one party should say that his sheep are worth five dollars each, and the other states that his cow is worth ten dollars, and upon that basis, the deal is consummated, it is simply a sale of

24. 2 Mechem, Sales, 1471, § 1844; Polhemus v. Helman, 45 Cal. 573; McAlpin v. Lee, 12 Conn. 129, 30 Am. Dec. 609; Woodruff v. Graddy, 91 Ga. 333; Noble v. Fagnant, 162 Mass. 275; St. Anthony Co. v. Bardwell-Robinson Co., 60 Minn. 199; McConnell v. Lewis, 58 Nebr. 188; Bouker v. Randles, 31 N. J. L. 335; Judd v. Dennison, 10 Wend. 513; Kester v. Miller, 119 N. Car. 475; Dayton v. Hoaglund, 39 Ohio St. 671; Falconer v. Smith, 18 Pa. St. 130, 55 Am. Dec. 611; Walker v. Hoisington, 43 Vt. 608; Tacoma Co. v. Bradley, 2 Wash. 600, 26 Am. St. 890; Springfield Co. v. Barnard, 81 Fed. 261, 26 C. C. A. 389, 49 U. S. App. 488.

If property is sold not subject to an existing mortgage thereon, the buyer, after paying the mortgage, can deduct the amount from the purchase-price. Lane v. Romer, 2 Chandl. 61.

25. Pacific Co. v. Mullen, 66 Ala. 582; Mears v. Nichols, 41 Ill. 207; Dill v. O'Ferrell, 45 Ind. 268; French v. Gordon, 10 Kans. 370; Mfg. Co. v. Wood, 84 Mich. 452; Compton v. Parsons, 76 Mo. 455; Poulton v. Lattimore, 9 B. & C. 259; Uniform Sales Act, § 69 (1), (a.)

26. This is what distinguishes it from a sale. 1 Mechem, Sales, 13, § 13.

27. Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Com. v. Davis, 75 Ky. 240; Slayton v. McDonald, 73 Me. 50; Dowling v. McKenney, 124 Mass. 480; Nance v. Metcalf, 19 Mo. App. 183 (a gun for a steer); Herrick v. Carter, 56 Barb. 41; Freeman v. Trummer, 50 Ore. 287; Thornton v. Moody (Tex. Civ. App. 1893), 24 S. W. 331; Jordan v. Dyer, 34 Vt. 104, 40 Am. Dec. 668; Williamson v. Berry, 49 U. S. 495, 12 L. ed. 1170; Read v. Hutchinson, 3 Campb. 352.

28. Pickard v. McCormick, 11 Mich. 68.

the sheep for ten dollars, and a sale of the cow for a like sum, both made concurrently, obviating the payment of money but in effect being the same as if one sale was completed before the other was contemplated, and the other made later in the day.

An exchange is distinguished from a bailment in that the latter generally requires the return of the identical article originally delivered. If wood is delivered under an agreement that the deliverer is to return an equal quantity of wood of the same quality, the transaction is an exchange.²⁹

If a transaction actually is an exchange it must be so designated in any legal proceeding brought in regard to it;³⁰ and this seems to be the principal instance where the distinction between a sale and an exchange becomes important.³¹ Generally the rules governing sales apply to exchanges, as the transactions are so similar;³² but

29. *Mitchell v. Gile*, 12 N. H. 390, *Ingler, Cas. in Sales*, 2, *Griffin, Illus. Cas. on Pers. Prop.* 35.

30. *Slayton v. McDonald*, 73 Me. 50; *Harrison v. Luke*, 14 M. & W. 139. An exchange will not support a count for "goods sold and delivered;" there must be a special count. *Mitchell v. Gile*, 12 N. H. 390, *Ingler, Cas. in Sales*, 2, *Griffin, Illus. Cas. on Pers. Prop.* 35.

31. 1 *Mechem, Sales*, 15, § 16; *Herrick v. Carter*, 56 Barb. 41; *Vall v. Strong*, 10 Vt. 457.

32. *Johnson v. State*, 69 Ala. 593; *Nance v. Metcalf*, 19 Mo. App. 183; 2 *Blacks. Comm.* 446.

There is an implied condition as to title in an exchange. 2 *Mechem, Sales*, 1125, § 1306; *Hunt v. Sackett*, 31 Mich. 18; *Close v. Crossland*, 47 Minn. 500; *Bixler v. Saylor*, 68 Pa. St. 146; *Patee v. Pelton*, 43 Vt. 182; *Byrnside v. Burdett*, 15 W. Va. 702.

The statute of frauds applies to an exchange under the same circumstances as it would in a sale. 1 *Mechem, Sales*, 301, § 328; *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222; *Dowling v. McKenney*, 144 Mass. 478; *Gorman v. Brossard*, 120 Mich. 611; *Ash v. Aldrich*, 67 N. H. 531; *Rutan v. Hinchman*, 30 N. J. L. 255; *Misner v. Strong*, 181 N. Y. 163; *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A. 501. See, also, *Sawyer v. Ware*, 36 Ala. 675.

An exchange may be absolute or conditional. *Rollins v. Wibye*, 40 Minn. 149, *Patee, Illus. Cas. in Personalty*, 409.

authority to an agent to sell does not confer authority upon him to make an exchange.³³

§ 195. Mortgages—Definition. A Mortgage³⁴ is a transfer of ownership as security.³⁵ A debt secured by a transfer of ownership sometimes is designated as a mortgage; and the word is used also to designate the contract³⁶ transferring the ownership.

Mortgages were recognized by the common law³⁷ and were regarded as conditional sales³⁸ of property transferring to the mortgagee³⁹ the legal title, which could be defeated only by the performance of the condition sub-

33. *Potter v. Dennison*, 10 Ill. 590; *Trudo v. Anderson*, 10 Mich. 357, 31 Am. Dec. 298; *Benny v. Pegram*, 18 Mo. 191, 59 Am. Dec. 298; *Taylor Co. v. Starkey*, 59 N. H. 142; *Warner v. Martin*, 52 U. S. 209, 13 L. ed. 667; *Guerreiro v. Pelle*, 3 B. & Ald. 616.

34. The word "mortgage" is of French origin, being originally a compound word—"mort-gage," from the Latin *cadium mortuum*. A *cadium mortuum* was a dormant or dead pledge and was used in contradistinction to *cadium vivum*—an acting or living pledge. Each originally was security for the payment of money. In the one there was no life or active effect in the way of creating means for its redemption by producing rents, because originally the mortgagor continued to hold possession and to receive these. In the other, the mortgagee took possession and received the rents, applying them on the debt, whereby the estate worked out, as it were, its own redemption. Besides, in the one case, if the pledge was not redeemed, it was lost or dead as to the mortgagor; whereas, in the other, the pledge always survived to the mortgagor when it had accomplished its purpose. 1 *Cobbey, Chat. Mort.*, 2, § 1.

35. *Hendren v. Wing*, 60 Ark. 561, 46 Am. St. 218; *Mosely v. Crocket*, 9 Rich. Eq. 339.

36. *Everett v. Buchanan*, 2 Dak. 249.

37. *Harding v. Coburn*, 53 Mass. 333, 46 Am. Dec. 680, *Griffin, Illus. Cas. on Pers. Prop.* 165; *Hannah v. Richter Co.*, 149 Mich. 220, 119 Am. St. 674, 14 Detroit Leg. N. 393, 12 L. R. A. N. S. 178.

38. *Durfee v. Grinnell*, 69 Ill. 371; *Reinstein v. Roberts*, 34 Oreg. 37, 75 Am. St. 564.

39. *Ellington v. Charleston*, 51 Ala. 166; *Moore v. Murdock*, 26 Cal. 514; *Everett v. Buchanan*, 2 Dak. 249; *Durfee v. Grinnell*, 69 Ill. 371; *Lee v. Fox*, 113 Ind. 98; *Marseilles Co. v. Morgan*, 12 Nebr. 69; *Bryant v. Carson Co.*, 3 Nev. 313, 93 Am. Dec. 403; *Hitchcock v. Northwestern Co.*, 26 N. Y. 68; *Welsh v. Usher*, 2 Hill Ch. 167, 29 Am.

sequent⁴⁰ specified in the agreement between the parties, such as payment of a debt or the performance of some other duty. Courts of equity,⁴¹ however, always regarded the mortgagor as being the owner of the property mortgaged.

§ 196. **Mortgages—Parties.** The parties to a mortgage are known as the mortgagor and the mortgagee, the former being the one making the mortgage¹ and owning the property which becomes the security; the latter being the one to whom the property is conveyed.² The parties must be named in the mortgage if written. If a blank space is left for the insertion of the mortgagee's name, the mortgage is invalid.³

Although the law⁴ forbids a national bank to take a chattel mortgage as security in making a loan, a mortgage so taken is not void;⁵ and a bank is authorized

Dec. 63; *Cline v. Libby*, 46 Wis. 123, 32 Am. Rep. 700; *Williams v. Neely*, 46 Fed. 450.

40. 1 Cobbey, Chat. Mort. 5, § 4.

41. 1 Cobbey, Chat. Mort. 6, § 4; *Davenport v. Bartlett*, 9 Ala. 179; *First B'k v. Erreca*, 116 Cal. 81, 58 Am. St. 133; *Simmons v. Jenkins*, 76 Ill. 479; *Buck v. Payne*, 52 Miss. 271; *Drummond Co. v. Mills*, 54 Nebr. 417, 69 Am. St. 719, 40 L. R. A. 761; *Ayre v. Hixson* (Oreg. 1908), 98 Pac. 515; *Wright v. Sherman* (S. Dak.), 52 N. W. 1093; *Calkins v. Clement*, 54 Vt. 635; *Merchants' B'k v. McLaughlin*, 2 Fed. 128.

By statute, in some states, a mortgage creates a lien only, the mortgagor remaining the owner. See *Ephraim v. Kelleher*, 4 Wash. 243, 18 L. R. A. 604.

1. 1 Cobbey, Chat. Mort. 4, § 3.

2. 1 Cobbey, Chat. Mort. 5, § 3.

3. 2 Cobbey, Chat. Mort. 1025, § 787; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Herr v. Denver Co.*, 13 Colo. 406, 6 L. R. A. 641; *People v. Organ*, 27 Ill. 29; *Simms v. Hervey*, 19 Iowa, 274; *Meighen v. Strong*, 6 Minn. 177 (Gil. 111), 80 Am. Dec. 441; *Chauncey v. Arnold*, 24 N. Y. 330; *Conover v. Porter*, 14 Ohio St. 450; *Preston v. Hull*, 64 Va. (28 Gratt.) 600, 14 Am. Rep. 153; *Drury v. Foster*, 69 U. S. 24.

4. U. S. Rev. St., § 5136.

5. 1 Cobbey, Chat. Mort. 545, § 415; *First B'k v. Elmore*, 52 Iowa, 541; *National B'k v. Matthews*, 98 U. S. 621.

to take and hold a mortgage to secure a claim already due to it.⁶ A mortgage to a partnership in its firm name⁷ is valid, the rules as to real property not applying.

§ 197. **Mortgages — Classification.** Mortgages are subject to several classifications, as follows: real estate mortgages and chattel mortgages; legal mortgages and equitable mortgages; common law mortgages and statutory mortgages; oral mortgages and written mortgages. Usually the word "mortgage" used without any qualifying term means a real estate mortgage, as such mortgages were in use before chattel mortgages,⁸ and the word long used alone acquired that meaning when that was the only meaning it could have;⁹ but in this chapter the word used alone will mean a chattel mortgage.

The expression "legal" mortgages is not used in contra-distinction to illegal mortgages, but indicates those which are recognized and enforced by common law courts, being the most common. Equitable¹⁰ mortgages are those which are recognized and enforced by chancery courts alone.

6. *First B'k v. Maxfield*, 33 Me. 576.

7. *Henderson v. Wing*, 60 Ark. 561, 46 Am. St. 218; *Chicago Co. v. Ashworth*, 26 Kans. 212.

8. 1 Cobbey, Chat. Mort. 2, § 1. A chattel mortgage is, as the expression itself indicates, a mortgage of personal property.

9. 1 Cobbey, Chat. Mort. 4, § 2.

10. Equitable mortgages arise in two cases, first, where the mortgage contains words of alienation sufficient to have passed the legal title if the property had been in existence; and, second, where there are no sufficient words of alienation, though the property is in existence. *Atwater v. Mower*, 10 Vt. 75. A contract to give a mortgage would be an instance of the latter class; *Davis v. Childers*, 45 S. Car. 133, 55 Am. St. 757; such contracts being enforced as mortgages upon the principle that equity will consider that done which ought to have been done. *Morrow v. Turney's Adm'r*, 35 Ala. 131. Placing a vessel's register in the hands of the buyer with an indorsement across it that the buyer is not to sell until the purchase money has been paid, is also an instance of the latter class, being analogous to the English custom of depositing title deeds to land. *Welsh v. Usher*, 2 Hill Ch. 167, 29 Am. Dec. 63.

§ 198. **Mortgages—Resemblances and Distinctions.** A mortgage bears a resemblance to many other transactions, it often being difficult¹¹ to determine what relation has resulted from particular negotiations. A mortgage resembles a pledge, each being given as security, and as to the mode of subjecting the property to a sale for a payment of the debt secured,¹² and in that the surplus, if any, after a sale belongs to the debtor.¹³ A mortgage is distinguished from a pledge in that a mortgage technically conveys the title,¹⁴ whereas in a pledge the title remains in the pledgor.¹⁵ Possession by a pledgee is essential,¹⁶ and if such possession is relinquished voluntarily the security is gone;¹⁷ while in a mortgage the mortgagor may be,¹⁸ and usually is, allowed to retain possession; that is, in a pledge the creditor is a bailee, while in a mortgage the debtor¹⁹ usually is the bailee. In a pledge, default by the debtor does not enlarge the rights of the pledgee;²⁰ but in a

11. *Gilbert v. National Co.*, 176 Ill. 288, reversing 67 Ill. App. 606.

12. *Wilson v. Brannan*, 27 Cal. 258.

13. *Wright v. Ross*, 36 Cal. 414.

14. *Heyland v. Badger*, 35 Cal. 404; *Beeman v. Lawton*, 87 Me. 543, *Griffin*, Illus. Cas. on Pers. Prop. 164; *Patchen v. Pierce*, 12 Wend. 61.

15. *Cortelyou v. Lansing*, 2 Cal. Cas. 200. In the case of choses in action it is unusually difficult to determine whether a transaction is a mortgage or a pledge. 1 *Cobbey*, Chat. Mort. 89, § 86. If the intention of the parties is in doubt, the courts usually construe the transaction as a pledge. *Haskins v. Kelly*, 1 Rob. 160, 1 Abb. Pr. N. S. 63.

16. *May v. Eastin*, 2 Port. 414; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. 23; *Dirigo Co. v. Woodruff*, 41 N. J. Eq. 336; *Huntington v. Mather*, 2 Barb. 538; *Mitchell v. Roberts*, 17 Fed. 776.

17. 1 *Cobbey*, Chat. Mort. 88, § 86.

18. *Sims v. Canfield*, 2 Ala. 555; *Heyland v. Badger*, 35 Cal. 404; *Jewett v. Warren*, 12 Mass. 300, 7 Am. Dec. 74; *Tannahill v. Tuttle*, 3 Mich. 110, 61 Am. Dec. 480; *Brown v. Bement*, 8 Johns. 76; *Doak v. Bank of State*, 28 N. Car. 309; *Barfield v. Cole*, 36 Tenn. 465; *Russell v. Fillmore*, 15 Vt. 135.

19. *Boswell v. Carlisle*, 70 Ala. 244.

20. *Wright v. Ross*, 36 Cal. 414.

mortgage, default by the mortgagor changes the legal title of the mortgagee from a conditional to an absolute one.

A mortgage is distinguished from a lien in its proper sense, in that the latter requires possession of the article, as in the case of a pledge, ownership not passing²¹ except the special ownership acquired by every bailee; a lien need not result from agreement as in the case of a mortgage, but may, and usually does, arise by operation of law; and, with few exceptions, the claim for which the lien is asserted relates to the property itself, whereas a mortgage may be, and very frequently is, given for a claim not having any connection with the property mortgaged.

A mortgage is distinguished from an assignment for the benefit of creditors, in that the former is given as security, leaving an equity of redemption in the mortgagor; while an assignment is an appropriation of his property by a debtor to the payment of his debts,²² passing both the legal and the equitable title absolutely beyond the control²³ of the assignor without any equity of redemption.²⁴

It frequently happens in a transfer of goods, that an unpaid seller, in order to protect himself, reserves title until the price is paid in full, such a transaction being called a conditional sale. This, however, is to be distinguished²⁵ from a mortgage, as the chief object of the contract in the former case is the ultimate transfer of ownership, and security is an incident; in a mortgage, security is the chief object, and the transfer of owner-

21. *Corbitt v. Reynolds*, 68 Ala. 378.

22. *Robson v. Tomlinson*, 54 Ark. 229.

23. *Doggett v. Bates*, 26 Ill. App. 369.

24. 1 *Cobbey*, Chat. Mort. 108, § 98.

25. In case of doubt whether a transaction is a conditional sale or a mortgage, the courts are inclined to solve it in favor of its being a mortgage. 1 *Cobbey*, Chat. Mort. 77, § 78.

ship is an incident. In a conditional sale the ownership remains in the seller, and payment of the price is a condition precedent to its transfer to the buyer, who, in the meantime, is a bailee; in a mortgage the ownership technically passes to the mortgagee subject to be defeated by the performance of a condition subsequent—as payment of the money secured.

Sometimes when goods are sold, the seller retains an option to repurchase. The distinction between such a sale and a mortgage is that the option must be exercised within the time limited, otherwise the right to repurchase is gone; whereas in a mortgage the right to redeem remains after default. In a sale with an option to repurchase, if the seller exercises his option, the subsequent transaction is regarded strictly as an independent deal with the same formalities as though the original buyer was reselling to a third person; in a mortgage, payment by the mortgagor instantly revests him with his title. A right to repurchase is binding on third persons with notice, whereas a mortgage may not be binding upon third persons with notice if the statute is not complied with.²⁶

If a dispute arises between two parties whether a transaction was an absolute sale, as claimed by the person in possession, or a mortgage, as claimed by the transferrer, the courts are inclined to solve any doubts in favor of the transaction having been a mortgage.²⁷ However, there is nothing illegal in an agreement between the seller and the buyer that the former can repurchase the property even at a higher price.²⁸

26. See, *post*, § 202.

27. Less hardship results from so holding, as the person who advanced the money gets it back with interest. Evidence that the sum advanced was greatly below the value of the property will be entitled to much weight. *Todd v. Hardie*, 5 Ala. 698.

28. *Rogers v. Blouenstein*, 124 Ga. 501, 3 L. R. A. N. S. 212.

§ 199. **Mortgages—Form.** At common law an oral¹ mortgage was valid, and is so under statutes so far as the parties themselves are concerned;² but under the recording acts mortgages must be in writing,³ otherwise there could not be compliance with the statutory provisions as to registration. A mortgage is not invalid merely because inartificially drawn or without punctuation,⁴ and is not required to be in any particular form,⁵

1. 1 Cobbey, Chat. Mort. 19, § 13; *Gassner v. Patterson*, 23 Cal. 299; *Davis v. Childers*, 45 S. Car. 133, 55 Am. St. 757; *Loyd v. Currin*, 22 Tenn. 462; *Flory v. Denny*, 7 Exch. 581. The evidence must be clear. 1 Cobbey, Chat. Mort. 23, § 15; *Turnipseed v. Cunningham*, 16 Ala. 501, 50 Am. Dec. 190; *Colvard v. Waugh*, 56 N. Car. 335.

It is difficult to distinguish between an oral mortgage and a pledge if the mortgagee takes possession. 1 Cobbey, Chat. Mort. 20, § 12; *Morrow v. Turney*, 35 Ala. 131; *Bardwell v. Roberts*, 66 Barb. 433.

2. 1 Cobbey, Chat. Mort., 21, § 14; *Brooks v. Ruff*, 37 Ala. 371; *Well v. Ryus*, 39 Kans. 564; *Reynolds v. Fitzpatrick*, 23 Mont. 52; *Ceas v. Bramley*, 18 Hun. 187; *McCoy v. Lassiter*, 95 N. Car. 880.

3. 1 Cobbey, Chat. Mort., 49, § 61.

4. A mortgage of crops describing them as "my entire crop of corn cotton seed fodder peas potatoes and cane that I may raise the present year on my place" will be construed to mean "my entire crop of corn, cotton, [cotton]-seed, fodder," etc. *Seay v. McCormick*, 68 Ala. 549.

5. *Ross v. Ross*, 21 Ala. 322; *Wright v. Ross*, 26 Cal. 414, 443; *Hart v. Burton*, 30 Ky. 322; *Bartels v. Harris*, 4 Me. 146; *Cooper v. Brock*, 41 Mich. 488; *Coe v. Cassidy*, 72 N. Y. 133; *McFadden v. Turner*, 48 N. Car. 481; *Moore v. Byrum*, 10 S. Car. 452, 30 Am. Rep. 58; *Barfield v. Cole*, 36 Tenn. 465; *Fowler v. Stoneum*, 11 Tex. 478; *Blodgett v. Blodgett*, 48 Vt. 32; *Musgat v. Pumpelly*, 46 Wis. 660; *Morgan v. Shinn*, 32 U. S. 105.

A mortgage does not require a date, that being needed merely to fix the time of payment; 2 Cobbey, Chat. Mort., 746, § 566; *Stonebreaker v. Kerr*, 40 Ind. 186; *Partridge v. Swazey*, 46 Me. 414; *Jacobs v. Denison*, 141 Mass. 117; *Parke v. Neeley*, 90 Pa. St. 52; and an ante-dated mortgage is valid; *Johnson v. Stellwager*, 67 Mich. 10; and oral evidence is admissible to show that the date named is not the true one. *Shaughnessey v. Lewis*, 130 Mass. 355.

Ordinarily a mortgage does not require a seal. 1 Cobbey, Chat. Mort., 551, § 391; *Cook v. Harrison*, 19 Ill. App. 402; *Gerrey v. White*, 47 Me. 504; *Sherman v. Fitch*, 98 Mass. 64; *Despatch Line v. Bellamy Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Gibson v. Warden*, 81 U. S. 244; *Flory v. Denny*, 7 Exch. 581, 11 Eng. L. & Eq. 584.

but the intention should be expressed clearly. The usual form⁶ is an absolute sale, describing the property, with a defeasance clause similar to a real estate mortgage, stating the names of the parties, the amount of the debt⁷ and the time it becomes due, and the rate of interest and the time when it begins. It is the common practice to recite that the mortgage is intended as security only, though these words are superfluous if the intention sufficiently appears from other portions of the instrument.⁸

A bill of sale and a defeasance⁹ or an agreement to resell,¹⁰ executed on the same day, must be construed together as one instrument constituting a mortgage, an oral defeasance being sufficient between the parties.¹¹ If an absolute conveyance and a defeasance clause are separate they must be contemporaneous; for if the defeasance clause is made afterwards without prior agreement therefor it would be without consideration¹² and invalid.

The intention¹³ of the parties, to be determined from the facts,¹⁴ governs; and any instrument executed as se-

Unless required by statute an acknowledgment or attestation is not necessary; 1 Cobbey, Chat. Mort., 531, § 404; but if required it must be according to the law of the place where the property is located. *McFadden v. Blocker*, 2 Ind. Terr. 260, 53 L. R. A. 373.

6. 1 Cobbey, Chat. Mort., 10, § 5.

7. 1 Cobbey, Chat. Mort., 50, § 62.

8. *Wright v. Ross*, 36 Cal. 414.

9. *Davis v. Hubbard*, 33 Ala. 135.

10. 1 Cobbey, Chat. Mort., 16, § 10; *Davis v. Hubbard*, 33 Ala. 135; *Polhemus v. Trainer*, 30 Cal. 635; *Whiting v. Eichelberger*, 16 Iowa, 422; *Lobban v. Garnett*, 39 Ky. 389; *Winslow v. Tarbox*, 18 Me. 132; *Taber v. Hamlin*, 97 Mass. 489; *Barnes v. Holcomb*, 20 Miss. 306; *Bragelman v. Daue*, 69 N. Y. 69; *Re Gurney*, 7 Biss. 414.

11. 1 Cobbey, Chat. Mort., 71, § 75.

12. *Freeman v. Baldwin*, 13 Ala. 246.

13. 1 Cobbey, Chat. Mort., 11, § 5; *Whittemore v. Fisher*, 132 Ill. 243; *Whiting v. Eichelberger*, 16 Iowa, 422; *Merrill v. Ressler*, 37 Minn. 32; *Gassert v. Bogk*, 7 Mont. 535; *Crane v. Decamp*, 21 N. J. Eq., 414; *Barry v. Coville*, (N. Y.) 29 N. E. 307; *Thornbrough v. Baker*, 2 White & T. Lead. Cas. Eq., 1030.

14. 1 Cobbey, Chat. Mort., 15, § 9; *Ellington v. Charleston*, 51 Ala. 166; *Scott v. Henry*, 13 Ark. 112; *Palmer v. Howard*, 72 Cal. 293, 1 Am. St. 60.

curity¹⁵ or providing for redemption¹⁶ of the property, will be regarded as a mortgage. A mortgage may be created by using the words "mortgage,"¹⁷ or "give a lien"¹⁸ or stipulating that certain property shall be bound for a debt,¹⁹ without other words of conveyance. An absolute conveyance without words of defeasance may be construed as a mortgage if it was the intention of the parties to give it as security.²⁰ In some states stat-

15. 1 Cobbey, Chat. Mort., 126, § 108; *Evington v. Smith*, 66 Ala. 398; *Folsom v. Fowler*, 15 Ark. 312; *Moore v. Murdock*, 26 Cal. 514; *Gage v. Perry*, 69 Iowa. 605; *Knapp v. Bailey*, 79 Me. 195; *First B'k v. Weed*, 89 Mich. 357; *Griffin*, Illus. Cas. on Pers. Prop. 169; *Barnes v. Holcomb*, 20 Miss. 306; *Desloge v. Ranger*, 7 Mo. 327; *Omaha Co. v. Sutherland*, 10 Nebr. 334; *Campbell v. Roddy*, 44 N. J. Eq. 244, 6 Am. St. 889; *Bissell v. Hopkins*, 3 Cow. 166, 15 Am. Dec. 259; *McFadden v. Jones*, 48 N. Car. 481; *Nicklin v. Betts Co.*, 11 Oreg. 406; *Pearson v. Sharp*, 115 Pa. St. 254; *McKnight v. Gordon*, 13 Rich. (13 S. Car. Eq.) 222; *Fowler v. Stoneum*, 11 Tex. 511, 62 Am. Dec. 490; *Blodgett v. Blodgett*, 48 Vt. 32; *First B'k v. Damm*, 63 Wis. 249; *The Panama, Olcott*, 343.

16. 1 Cobbey, Chat. Mort., 74, § 76; *Morrow v. Turney*, 35 Ala. 131; *Hart v. Burton*, 30 Ky. 322; *Reed v. Jewett*, 5 Me. 96; *Barnes v. Holcomb*, 20 Miss. 306; *Barrow v. Paxton*, 5 Johns. 258, 4 Am. Dec. 354; *Wilson v. Weston*, 57 N. Car. 349; *Wood v. Dudley*, 8 Vt. 435.

17. 1 Cobbey, Chat. Mort., 12, § 6; *Mervine v. White*, 50 Ala. 388; *DeLeon v. Higuera*, 15 Cal. 483; *Marsh v. Wade* (Wash. Terr.), 20 Pac. 378.

18. *Ellington v. Charleston*, 51 Ala. 166; *Whiting v. Eichelberger*, 16 Iowa, 422; *Merrill v. Ressler*, 37 Minn. 82; *Dunning v. Stearns*, 9 Barb. 630; *Harris v. Jones*, 83 N. Car. 317; *Byrd v. Wilcox*, 55 Tenn. (8 Baxt.) 65.

19. *Wright v. Bircher*, 72 Mo. 179, 37 Am. Rep. 433. A clause, "one black horse named Bill is holding until this note is paid" is in effect a mortgage between the parties. *Emerson v. Knapp*, 114 N. Y. Supp. 794.

20. 1 Cobbey, Chat. Mort., 18, § 7; *Scott v. Henry*, 13 Ark. 112; *Parsell v. Thayer*, 39 Mich. 467; *Omaha Co. v. Sutherland*, 10 Nebr. 334; *Coe v. Cassidy*, 72 N. Y. 133; *Nicklin v. Betts Co.*, 11 Oreg. 406, 50 Am. Rep. 477; *First B'k v. Damm*, 63 Wis. 249. The evidence must be clear. *Freeman v. Baldwin*, 13 Ala. 246; *Boh v. Irwin* (Ky.), 51 S. W. 444; *Whittemore v. Fisher*, 132 Ill. 243; *Rogers v. Beach*, 115 Ind. 413; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Cake v. Shull*, 45 N. J. Eq. 208; *Coyle v. Davis*, 116 U. S. 108.

utes have provided a form,²¹ whose provision it is not safe to neglect,²² although a substantial compliance therewith may suffice.²³

§ 200. **Mortgages—Subjects of.** Generally any personal property¹ may be the subject of a chattel mort-

Taking judgment for the amount of the consideration named in an absolute conveyance is evidence that it was a mortgage. 1 Cobbey, Chat. Mort., 74, § 76; Hamet v. Dundass, 4 Pa. St. 178.

21. 1 Cobbey, Chat. Mort., 26, § 17; Herr v. Denver Co., 13 Colo. 406, 6 L. R. A. 641. It is impossible to give a form good in every state. 1 Cobbey, Chat. Mort., 50, § 62.

Mortgages of vessels must conform to the Acts of Congress. U. S. v. The Perez, 8 Ben. 109. They are not affected by the state laws; 1 Cobbey, Chat. Mort., 422, § 318; Fontaine v. Beers, 19 Ala. 722; Wood v. Stockwell, 55 Me. 76; Robinson v. Rice, 3 Mich. 235; Shaw v. McCandless, 36 Miss. 296; Folger v. Weber, 16 Hun, 512; unless they never have been enrolled under the federal laws. 1 Cobbey, Chat. Mort. 483, § 329; Thurber v. The Fanny, 8 Ben. 429.

22. 1 Cobbey, Chat. Mort., 53, § 63; Crane v. Chandler, 5 Colo. 21; McDonald v. Stewart, 85 Ill. 540.

Statutes sometimes require that mortgages of chattels usually exempt, such as household goods, cannot be executed by either spouse alone. 1 Cobbey, Chat. Mort., 34, § 29.

23. 1 Cobbey, Chat. Mort. 525, § 395; Milburn Co. v. Johnson, 9 Mont. 537. The entry of the acknowledgment by a justice in a special docket kept for that express purpose, instead of in his general docket, is a substantial compliance with the statute. Pike v. Colvin, 67 Ill. 227; 1 Cobbey, Chat. Mort. 538, § 405. A trifling mistake in the copy filed will not vitiate the mortgage. Gillespie v. Brown, 16 Nebr. 461.

1. A mortgage can be made of shares of corporate stock; Tregear v. Etiwanda Co., 76 Cal. 537, 9 Am. St. 245; Manns v. Brookville B'k, 73 Ind. 243; of a real estate mortgage securing a note; Wright v. Ross, 36 Cal. 414; of a policy of insurance; 1 Cobbey, Chat. Mort., 240, § 194; Dungan v. Mutual Co., 46 Md. 469; of a patent; Walker, Pat. (4th ed.) 253, § 288a; of a leasehold interest; 1 Cobbey, Chat. Mort., 557, § 425; Chase v. Ingalls, 122 Mass. 381; or of property in the possession of a bailee; 1 Cobbey, Chat. Mort., 237, § 191; or in the possession of an officer who has levied upon it; 1 Cobbey, Chat. Mort., 548, § 419; Gardner v. Bunn, 132 Ill. 403, 7 L. R. A. 729; Pindell v. Grooms, 27 Ky. 501; Appleton v. Bancroft, 51 Mass. 231; Thompson v. Van Vechten, 6 Bosw. (19 N. Y. Super.) 373; or even of an interest liable to be defeated by the non-performance of a condition, as in the case of a conditional sale. 1 Cobbey, Chat. Mort., 237, § 190; Everett v. Hall, 67 Me. 497; Crompton v. Pratt, 105 Mass. 255; Chafey v. Mathews, 104 Mich. 103, 37 L. R. A. 553.

gage; but a mortgage of property not in existence² or which is to be acquired³ by the mortgagor, or to be substituted⁴ for property already mortgaged, does not create any lien⁵ on the property when brought into existence or acquired,⁶ being merely an executory agreement binding on the parties⁷ but not on third persons,⁸ unless

As between the mortgagor and the mortgagee the former will not be permitted to deny his title. 1 Cobbey, Chat. Mort., 466, § 355; Turner v. First B'k, 78 Ind. 19; Bunker v. Steward (Me.), 4 Atl. 558.

2. 1 Cobbey, Chat. Mort., 460, § 350. Under the civil law, property not *in esse* could not be mortgaged so as to vest a title in the mortgagee when the property did come *in esse*. Domat, Civil Law, pt. 1, bk. 3, tit. 1, § 1.

A mortgage on machinery to be manufactured is invalid as against persons to whom the property is transferred by the mortgagor. Deeley v. Dwight, 132 N. Y. 59, 18 L. R. A. 298.

3. 1 Cobbey, Chat. Mort., 473, § 359; Sparks v. Mack, 31 Ark. 666; Brasher v. Christophe, 10 Colo. 284; Greenbaum v. Wheeler, 91 Ill. 296; Zaring v. Cox, 78 Ky. 527; Rose v. Bevan, 10 Md. 466; Harding v. Coburn, 53 Mass. 333, 46 Am. Dec. 680; Griffin, Illus. Cas. on Pers. Prop. 165; Stein v. Munch, 24 Minn. 390; Joseph v. Levi, 58 Miss. 843; France v. Thomas, 86 Mo. 80; Leopold v. Silverman, 7 Mont. 266; Wilson v. Hill, 17 Nev. 401; Zartman v. First B'k, 189 N. Y. 267, 12 L. R. A. N. S. 1083; Sharpe v. Pearce, 74 N. Car. 600; Jacobs v. Ervin, 9 Oreg. 52; McKibbin v. Martin, 64 Pa. St. 352; National B'k v. Elbert, 65 Tenn. (9 Heisk.) 153; National B'k v. Lovenberg, 63 Tex. 506; Sheppards v. Turpin, 44 Va. (3 Gratt.) 373; Gorden v. Bodwing, 9 W. Va. 121; Anderson v. Patterson, 64 Wis. 557; Robinson v. Elliott, 89 U. S. 513. A mortgage of a stock in trade to be purchased is invalid as against persons to whom the property is transferred by the mortgagor. Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518, Griffin, Illus. Cas. on Pers. Prop. 195.

By statute, in some states, after-acquired property is covered by a prior mortgage. Garrison v. Street Co., (Okla.) 97 Pac. 978.

4. Simmons v. Jenkins, 76 Ill. 479.

5. Smithhurst v. Edmunds, 14 N. J. Eq. 408; Lunn v. Thornton, 1 C. B. 379.

6. Jones v. Richardson, 64 Mass. 481; Otis v. Sill, 8 Barb. 102.

7. 1 Cobbey, Chat. Mort., 466, § 355; Marshall v. Stewart, 80 Ind. 189; Wheeler v. Becker, 68 Iowa, 723; Deering v. Cobb, 74 Me. 332, 43 Am. Rep. 596; Blanchard v. Cooke, 144 Mass. 207; Cadwell v. Pray, 41 Mich. 307; Davis v. Marx, 55 Miss. 376; Akers v. Rowan, 33 S. Car. 451, 10 L. R. A. 705.

8. Webster v. Nichols, 104 Ill. 160; Long v. Hines, 40 Kana. 220; Gardner v. McEwen, 19 N. Y. 122.

the parties take further action, such as making delivery* of the property to the mortgagee, before third persons acquire liens thereon.¹⁰ In equity,¹¹ however, a mortgage of after-acquired property will be upheld, a lien attaching to the property as soon as it comes into existence or is acquired by the mortgagor, even though no further action is taken by the mortgagee; but even equity will not allow a mortgage of future goods to be asserted against a purchaser thereof for value without notice.¹²

§ 201. Mortgages—Description of Subject Matter. As a general rule, any description of the mortgaged

A mortgage of property to be acquired *in futuro* is void as against creditors; 1 Cobbey, Chat. Mort., 473, § 359; Loth v. Carty, 85 Ky. 591; and an execution levied upon the goods after they are acquired will prevail in law over the prior mortgage. 1 Cobbey, Chat. Mort., 473, § 363; Looker v. Peckwell, 38 N. J. L. 253.

9. 1 Cobbey, Chat. Mort., 471, § 358; Stern v. Simpson, 62 Ala. 194; Titus v. Mabey, 25 Ill. 257; Burrill v. Whitcomb, 100 Me. 286, 1 L. R. A. N. S. 451; Bennett v. Bailey, 150 Mass. 257; Curtis v. Wilcox, 49 Mich. 425; Thompson v. Foerstel, 10 Mo. App. 290; Miller v. Jones (N. J.), 15 N. B. R. 160; McCaffrey v. Woodin, 65 N. Y. 459; Francisco v. Ryan, 54 Ohio St. 307, 56 Am. St. 711; Cook v. Corthell, 11 R. I. 482, 23 Am. Rep. 518; Moore v. Byrum, 10 S. Car. 452, 30 Am. Rep. 58; Peabody v. Landon, 61 Vt. 318, 15 Am. St. 903; Lamson v. Moffat, 61 Wis. 153.

10. Cameron v. Marvin, 26 Kans. 612; Pettee v. Dustin, 58 N. H. 303.

11. 1 Cobbey, Chat. Mort., 511, § 386; Keith v. Ham, 39 Ala. 590; Apperson v. Moore, 30 Ark. 56; Simmons v. Jenkins, 76 Ill. 479; Fejavy v. Broesch, 52 Iowa, 33; Zaring v. Cox, 78 Ky. 527; Griffith v. Douglass, 73 Me. 532; France v. Thomas, 86 Mo. 80; Williamson v. New J. Co., 29 N. J. Eq. 311, 1 Gray, Cas. on Prop. 768; McCaffrey v. Woodin, 65 N. Y. 459; Philadelphia Co. v. Woelpper, 64 Pa. St. 366; Williams v. Winsor, 12 R. I. 9; Parker v. Jacobs, 14 S. Car. 112, 37 Am. Rep. 724; Phelps v. Murray, 2 Tenn. Ch. 746; First B'k v. Turnbull, 73 Va. (32 Gratt.) 695; Beall v. White, 94 U. S. 332; Holroyd v. Marshall, 10 H. L. Cas. 191. *Contra*: Moody v. Wright, 54 Mass. 17, 46 Am. Dec. 706; Hunter v. Bosworth, 43 Wis. 533.

This is an application of the equitable maxim that "equity considers that done which ought to be done." 1 Cobbey, Chat. Mort., 516, § 339.

12. Booker v. Jones, 55 Ala. 266; Sillers v. Lester, 43 Miss. 513.

property suffices as between the parties if they know and understand what was intended to be covered, but as to third persons the property must be described sufficiently to identify it or to suggest inquiry by which it can be identified,¹ for if the property is misdescribed,² third persons without notice acquiring interests in the property, are not affected by the mortgage.³

A description equally applicable to any article of a class is too indefinite;⁴ and naming an unascertained portion is insufficient⁵ if separation has not been made.⁶ However, if the articles mortgaged are all that the mortgagor owns of that description, the fact that a number is specified will not invalidate;⁷ and a mortgage covering

1. 1 Cobbey, Chat. Mort., 234, § 183; *Tootie v. Lyster*, 26 Kans. 589; *Leighton v. Stuart*, 19 Nebr. 546. In 1 Cobbey, Chat. Mort., 10, § 5, it is said that "perhaps more litigation has grown out of imperfect and faulty description of the property than any other part of the mortgage."

The requirements as to description are not so rigid as in the case of real property. 1 Cobbey, Chat. Mort., 186, § 159; *Morris v. Connor* (N. Car.), 12 S. E. 917.

2. Where mortgaged cattle were described as being branded on the horn, which was not true, such a description would stifle all inquiry on the part of one negotiating in regard to them. *Irvin v. Hines*, 45 Iowa, 73.

3. *Borden v. Croak*, 131 Ill. 68, 19 Am. St. 23; *Bowman v. Roberts*, 58 Miss. 126.

4. 1 Cobbey, Chat. Mort., 224, § 182; *Hayes v. Wilcox*, 61 Iowa, 732.

5. 1 Cobbey, Chat. Mort., 227, § 183; *Krone v. Phelps*, 43 Ark. 350; *Croswell v. Allis*, 25 Conn. 301; *Bullock v. Williams*, 33 Mass. 33; *Nicholson v. Karpe*, 58 Miss. 34; *Newell v. Warner*, 44 Barb. 263; *Spivey v. Grant*, 96 N. Car. 214; *Fowler v. Hunt*, 43 Wis. 345.

6. *Cass v. Gunnison*, 58 Mich. 108; 1 Cobbey, Chat. Mort., 225, § 182. A mortgage of four hundred bushels of corn now growing and being on certain premises on which there are over one thousand bushels of different qualities and values, is not sufficient. *Clark v. Voorhees*, 36 Kans. 144.

7. If the mortgagor had but fourteen mules upon his plantation, a mortgage would be valid which described them as "fourteen mules now on my plantation." *Hurt v. Redd*, 64 Ala. 85.

all of the articles of a class in a designated place⁸ is sufficient.

Generally a description as specific as the nature of the property will allow,⁹ suffices. Although the description itself may not identify the property completely, it is sufficient if it will lead to its identification by inquiry which the instrument suggests.¹⁰ A description may be said to be insufficient only when it is so misleading as not even to suggest the property intended to be mortgaged.¹¹ A description substantially corresponding to the property intended to be covered, will not be insufficient if the mortgagor does not have any other property to which it can apply, so that no one can be misled.¹² If inquiry is suggested, evidence is competent to identify¹³ the property and to distinguish it from other property of a similar kind,¹⁴ as it is impossible to describe personal property so as to preclude the necessity of evidence to identify it.¹⁵ Thus, while, apparently, it is

8. *Johnson v. Grissard*, 51 Ark. 410, 3 L. R. A. 795; *Shaffer v. Pickrell*, 22 Kans. 619; *Union B'k v. Oium*, 3 N. Dak. 193, 44 Am. St. 533. "All my tools and implements in" a designated shop is sufficient. *Harding v. Coburn*, 53 Mass. 333, 46 Am. Dec. 680, *Griffin, Illus. Cas. on Pers. Prop.*, 165.

9. 1 *Cobbey, Chat. Mort.*, 189, § 162; *Hughes v. Wheeler*, 66 Iowa, 641; *Knapp v. Dietz*, 64 Wis. 31.

10. 1 *Cobbey, Chat. Mort.*, 204, § 170; *Pike v. Colvin*, 67 Ill. 227; *Rhutasel v. Stephens*, 68 Iowa, 627; *Scrafford v. Gibbons*, 44 Kans. 533; *Tolbert v. Horton*, 33 Minn. 104; *Rawlins v. Kennard*, 26 Nebr. 181; *Reynolds v. Strong*, 10 N. Dak. 81, 33 Am. St. 680.

11. 1 *Cobbey, Chat. Mort.*, 234, § 183.

12. 1 *Cobbey, Chat. Mort.*, 180, § 155; *Schmidt v. Bender*, 39 Kans. 437.

13. 1 *Cobbey, Chat. Mort.*, 184, § 158; *Turner v. McFee*, 61 Ala. 468; *Pike v. Colvin*, 67 Ill. 227; *Burns v. Harris*, 66 Ind. 536; *Ormsby v. Nolan*, 69 Iowa, 130; *Elder v. Miller*, 60 Me. 118; *Jordan v. Hamilton B'k*, 11 Nebr. 499; *Brooks v. Aldrich*, 17 N. H. 443; *Stephens v. Tucker*, 14 N. J. L. 600.

14. *Harris v. Woodard*, 96 N. Car. 232; *Butter v. Hill*, 48 Tenn. (1 Baxt.) 375.

15. 1 *Cobbey, Chat. Mort.*, 194, § 166; *Mills v. Kansas Co.*, 26 Kans. 574.

more bald to say "all my household furniture" than to enumerate the articles and to describe them, as "two dozen chairs, five tables," etc., in reality the latter description requires evidence to identify the property as much as the former,¹⁶ and the fullest possible description only leads to identification.¹⁷ Changes in the form¹⁸ of mortgaged property do not affect the mortgage as between the parties, nor as to third persons unless the article has been so changed as to be unrecognizable¹⁹ and interests therein have been acquired in good faith for value.²⁰

§ 202. **Mortgages—Delivery of Property.** Under the old common law a mortgage was valid as against everyone without delivery to the mortgagee of the property which it covered; but this rule of allowing retention of the property by the mortgagor without question, afforded great opportunity for collusion and fraud in cases where a mortgage never had been given, as some friend of the owner without right could claim to have a mortgage on property which creditors of the owner were trying to subject to their claims, thus keeping it from them. With a view to preventing this practice, statutes were enacted which provided for constructive notice in cases where the mortgagor retained possession; but even under such statutes a mortgage is valid between the parties although

16. *Harding v. Coburn*, 53 Mass. 323, 46 Am. Dec. 630, *Griffin, Illus. Cas. on Pers. Prop.* 165.

17. *Willey v. Snyder*, 34 Mich. 60.

18. A mortgage of cucumbers in bulk in salt is good after their preparation for market has been completed and they are bottled. *Crosby v. Baker*, 38 Mass. 295.

19. A mortgagee of a "bay" horse does not lose his right because the horse entirely changes color to a white and sorrel spotted horse, due probably to old age; "the horse may shed his color, but a mortgage is not so easily shed. It usually sticks closer than the skin." *Turpin v. Cunningham*, 127 N. Car. 508, 80 Am. St. 303, 51 L. R. A. 300.

20. *Perry v. Pettingill*, 33 N. H. 423.

the mortgagor remains in possession¹ without compliance with the statute. The various States have reached different conclusions whether, as to third persons, retention of possession by the mortgagor without compliance with the statute, renders the mortgage *prima facie* or conclusively fraudulent. In some States² such retention of possession is only *prima facie* fraudulent, that is, while there is a presumption of fraud, it is a question of fact only, and such presumption can be rebutted by evidence showing the transaction to be fair and honest;³ but, in other States,⁴ retention of possession by the mortgagor is presumed conclusively by law to be fraudulent as to third persons and the contrary will not be permitted to be shown.⁵ Possession of the property

1. *Tregear v. Etiwanda Co.*, 76 Cal. 537, 9 Am. St. 245; *Forest v. Tinkham*, 29 Ill. 141; *Flower v. Cornish*, 25 Minn. 473; *Johnson v. Jeffries*, 30 Mo. 423; *Bryant v. Carson Co.*, 3 Nev. 313, 93 Am. Dec. 403. The common law theory is that the mortgagor, having divested himself of his estate in the chattels by giving the mortgage, does not have any power to dispose of the same estate to others. *McKnight v. Gordon*, 13 Rich. (13 S. Car. Eq.) 222.

2. Alabama, Arkansas, Connecticut, Georgia, Iowa, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Vermont, Washington, and Wyoming. See, 1 Cobbey, Chat. Mort., 362.

3. *Martin v. Ogden*, 41 Ark. 191; *McKay v. Shotwell*, 6 Dak. 124; *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160; *Melody v. Chandler*, 12 Me. 232; *Briggs v. Parkman*, 43 Mass. 258, 37 Am. Dec. 89; *Gay v. Bidwell*, 7 Mich. 519; *Ewing v. Cargill*, 21 Miss. 79; *Turner v. Killian*, 12 Nebr. 580; *Miller v. Shreve*, 29 N. J. L. 250; *Gardner v. McEwen*, 19 N. Y. 123; *Williams v. Winsor*, 13 R. I. 9; *Hirshkind v. Israel*, 18 S. Car. 157; *Peabody v. Landon*, 61 Vt. 318; *Hunter v. Corbett*, 7 Up. Can. Q. B. 75; *Payne v. Fern*, 6 Q. B. D. 620.

4. California, Colorado, Illinois, Maryland, Minnesota, Nevada, New Mexico, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia.

5. *Huschle v. Morris*, 131 Ill. 587; *Horton v. Williams*, 21 Minn. 187; *Wilson v. Hill*, 17 Nev. 401; *Speigelberg v. Hersch*, 3 N. Mex. 185; *Orton v. Orton*, 7 Oreg. 478, 33 Am. Rep. 717; *Clow v. Woods*, 5 Serg. & R. 279, 9 Am. Dec. 346; *Peiser v. Peticolas*, 50 Tex. 638, 32 Am. Rep. 621; *Gardner v. Bodwing*, 9 W. Va. 121; *Blakeslee v. Rossman*, 43 Wis. 116.

by the mortgagee is notice to third persons of the rights of the mortgagee therein.*

In a few States, the transaction is fraudulent in law only when the instrument itself provides that the mortgagor is to sell the mortgaged chattels for his own use. 1 Cobbey, Chat. Mort., 363; Hubbell v. Allen, 90 Mo. 574.

6. 1 Cobbey, Chat. Mort., 678, § 498; First B'k v. McElroy, (Tex. Civ. App. 1908) 112 S. W. 801. If a person buys from the mortgagor, property in the possession of the mortgagee, the buyer is presumed to know that a person in possession may have some right to the property, otherwise why does he have it.

If the buyer does not make inquiry he is presumed to have the knowledge which such inquiry would have revealed. 2 Cobbey, Chat. Mort., 329, § 626; Smith v. Zurcher, 9 Ala. 208.

Even where the mortgagor originally remained in possession under such circumstances that the mortgage would be invalid as to third persons, the defects will be cured by the mortgagee taking possession before the rights of third persons attach to the property. 1 Cobbey, Chat. Mort., 678, § 498; Noyes v. Ross, 23 Mont. 425, 75 Am. St. 543, 47 L. R. A. 400; Moresi v. Swift, 15 Nev. 215; Darland v. Levins, (Wash.) 20 Pac. 309. If the mortgagee in an unrecorded mortgage, take possession before any other right or lien attaches to the goods, the mortgagee will be protected. Garner v. Wright, 52 Ark. 385, 6 L. R. A. 715; Hamlin v. Jerrard, 73 Me. 62, 79; Chase v. Denny, 130 Mass. 566; Parsell v. Thayer, 39 Mich. 467; Baldwin v. Flash, 53 Miss. 593; Brunswick-Balke-Collender Co. v. Kraus, 132 Mo. App. 328; Clute v. Steele, 6 Nev. 339; Brown v. Platt, 3 Bosw. (21 N. Y. Super.) 324; Brown v. Webb, 20 Ohio, 389; Garrison v. Street Co., (Okla. 1908) 97 Pac. 978; Cobel v. Nonemaker, 78 Pa. St. 501; Cotton v. Marsh, 3 Wis. 221; Wood v. Weimar, 104 U. S. 786. Likewise, after a mortgage has expired, if the mortgagee takes possession before the rights of third persons have attached to the property, he will be protected. 2 Cobbey, Chat. Mort., 791, § 596; Chipron v. Felkert, 68 Ill. 234, McTaggart v. Rose, 14 Ind. 230; Dayton v. People's B'k, 23 Kans. 421; Eastman v. St. Anthony Co., 24 Minn. 437; Frank v. Playter, 73 Mo. 672; National Bank v. Sprague, 21 N. J. Eq. 530; Porter v. Parmly, 52 N. Y. 185; Chapman v. Weimar, 4 Ohio St., 481. An agreement by the mortgagee that the mortgagor may remain in possession of the mortgaged articles and sell them in the usual course of business, is not fraudulent if the mortgagee takes possession of the articles before other creditors of the mortgagor seize them. Francisco v. Ryan, 54 Ohio St., 307, 56 Am. St. 711; Blakeslee v. Rossman, 43 Wis. 126. Taking possession of the mortgaged property cures defects in acknowledgment; 1 Cobbey, Chat. Mort., 532, § 404; Garner v. Wright, 52 Ark. 385, 6 L. R. A. 715; Gaar v. Hurd, 92 Ill. 315; Cameron v. Marvin, 26 Kans. 612; Greeley v.

§ 203. **Mortgages—Registration.** In order to be protected fully against third persons and to escape the burden of proving good faith,⁷ the mortgagee was required at common law to take possession of the mortgaged property;⁸ but this resulted in depriving the mortgagor of the use of property which he might need every day and threw upon the mortgagee the burden of caring for property which might not be of any use to him. To remedy this by allowing the mortgagor to retain possession,⁹ yet giving notice to third persons of the rights of the mortgagee, statutes have been enacted providing for filing mortgages with some public officer where they, or copies of them, can be seen by anyone making inquiry, thus giving the public constructive¹⁰ notice¹¹ of

Reading, 74 Mo. 309; *Hanselt v. Harrison*, 105 U. S. 405; and, by identifying it, cures defects in description. 1 *Cobbey*, Chat. Mort., 233, § 187; *Robinson v. Mauldin*, 11 Ala. 530; *Pennington v. Jones*, 57 Iowa, 37; *Parsons B'k v. Sargent*, 20 Kans. 576; *Stephens v. Tucker*, 14 N. J. L. 600; *Williamson v. Steele*, 71 Tenn. 520; *Frost v. Citizens' B'k*, 63 Wis. 234.

7. *Fromme v. Jones*, 13 Iowa, 474; *Morrill v. Sanford*, 49 Me. 566; *Forbes v. Parker*, 33 Mass. 462; *Miller v. Whitson*, 40 Mo. 97; *Harrington v. Brittan*, 23 Wis. 591.

8. *McFadden v. Blocker*, 2 Ind. Terr. 260, 58 L. R. A. 373.

9. 2 *Cobbey*, Chat. Mort., 735, § 560; *Coles v. Clark*, 57 Mass. 399.

10. 2 *Cobbey*, Chat. Mort., 736, § 562; *Whittleshoffer v. Strauss*, 83 Ala. 517; *Johnson v. Grissard*, 51 Ark. 410, 3 L. R. A. 795; *Rider v. Edgar*, 54 Cal. 127; *Herr v. Denver Co.*, 13 Colo. 406, 6 L. R. A. 641; *Bailey v. Godfrey*, 54 Ill. 504, 5 Am. Rep. 157; *Close v. Hodges*, 44 Minn. 204.

Registration is constructive notice only when the statute authorizes it and it is made in substantial conformity to the statutory requirements. 2 *Cobbey*, Chat. Mort., 769, § 583; *Frank v. Miner*, 50 Ill. 444; *Lovell v. Osgood*, 60 N. H. 1. In any event, registration is notice only to the extent provided by the statute. 2 *Cobbey*, Chat. Mort., 738, § 563; *Monroe v. Hamilton*, 60 Ala. 226.

11. 2 *Cobbey*, Chat. Mort., 831, § 628; *Kuhn v. Graves*, 9 Iowa, 305; *Edmondson v. Beale*, 27 Kans. 656; *Miller v. Whitson*, 40 Mo. 98; *Davis v. Blume*, 1 Mont. 463; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62; *Nicklin v. Betts Co.*, 11 Oreg. 406, 50 Am. Rep. 477; *McKnight v. Gordon*, 13 Rich. (13 S. Car. Eq.) 222; *Wright v. Sherman*, (S. Dak.) 53 N. W. 1093; *The De Smet*,

their existence. As filing is a substitute¹² for change of possession,¹³ it is not required if such change has occurred;¹⁴ and, as in the case of non-delivery of the property, a mortgage is valid between the parties whether filed for record or not.¹⁵ If third persons have actual notice of an unrecorded mortgage it is valid as to them;¹⁶ though in some States the rule is that actual

10 Fed. 433. Everyone, though lacking actual notice, is construed by the statute to have notice; for, as everyone is conclusively presumed to know the law, he theoretically is negligent if he does not resort to the office where information can be obtained whether there is any incumbrance on property in which he desires to acquire an interest.

12. *McFadden v. Blocker*, 2 Ind. Terr. 260, 58 L. R. A. 378.

13. 2 *Cobbey, Chat. Mort.*, 738, § 563; *Benedict v. Renfro*, 75 Ala. 121, 51 Am. Rep. 429; *Ruggles v. Cannedy*, 127 Cal. 290, 46 L. R. A. 371; *Duke v. Strickland*, 43 Ind. 494; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Cohoon v. Miers*, 67 Md. 573; *Forbes v. Parker*, 33 Mass. 462; *Griffin, Illus. Cas. on Pers. Prop.* 184; *Keenan v. Stimson*, 32 Minn. 377; *Humphries v. Barte*, 18 Miss. 282; *Janvrin v. Fogg*, 49 N. H. 340; *Nicklin v. Betts Co.*, 11 Oreg. 406, 50 Am. Rep. 477. Filing removes the *prima facie* presumption of fraud arising from possession by the mortgagor. *Cotton v. Marsh*, 3 Wis. 221.

14. 2 *Cobbey, Chat. Mort.*, 734, § 560; *Fromme v. Jones*, 13 Iowa, 474; *Cooper v. Brock*, 41 Mich. 483.

15. 2 *Cobbey, Chat. Mort.*, 826, § 624; *Hardaway v. Semmes*, 24 Ga. 305; *Stephenson v. Browning*, 48 Ill. 78; *Reynolds v. Quick*, 128 Ind. 316; *Perkins v. Emerson*, 59 Me. 31; *Pratt v. Harlow*, 32 Mass. 379; *Lyle v. Palmer*, 42 Mich. 314; *Johnson v. Jeffries*, 30 Mo. 423; *Sanford v. Munford*, 31 Nebr. 792; *Hayman v. Jones*, 7 Hun. 238; *Wilson v. Leshe*, 20 Ohio, 161; *Keller v. Smalley*, 63 Tex. 512.

16. 2 *Cobbey, Chat. Mort.*, 809, § 610; *Merrick v. Avery*, 14 Ark. 370; *McFadden v. Blocker*, 3 Ind. Terr. 224, 58 L. R. A. 394; *Howard v. First B'k*, 44 Kans. 549; *Robson v. Michigan Co.*, 37 Mich. 70; *Tolbert v. Horton*, 31 Minn. 518; *Russell v. Longmoor*, 29 Nebr. 209; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Gildersleeve v. Landon*, 73 N. Y. 609; *Union B'k v. Olum*, 3 N. Dak. 193, 44 Am. St. 533; *Coble v. Nonemaker*, 78 Pa. St. 501; *Cape Co. v. Conner*, 3 Rich. 335; *Darland v. Levins*, 1 Wash. St. 582; *Hobbs v. The Interchange*, 1 W. Va. 57; *Moore v. Simonds*, 100 U. S. 145, 19 Am. Law Reg. 394. The sole object of recording is to give notice; and if a person has notice otherwise than from the record, the full purpose of the recording act is attained. 2 *Cobbey, Chat. Mort.*, 808, § 610; *Allen v. McCalla*, 25 Iowa, 464, 36 Am. Dec. 56; *Clark v. Flint*, 39 Mass. 221, 33 Am. Dec. 723.

notice of an unrecorded mortgage does not affect them.¹⁷

§ 204. **Mortgages—Validity.** Permitting the mortgagor to sell the mortgaged property in the usual course of trade, will make the mortgage constructively¹ fraudulent and void as to third persons,² not because the transaction is inspired by bad intent, but because it naturally leads to bad results.³ Absolute power given to the mortgagor to sell confers on him a dominion utterly inconsistent with a lien, and, in effect, is a revocation of the mortgage,⁴ as the mortgagee could not maintain an action for the goods sold.

17. *Dodd v. Parker*, 40 Ark. 536; *Frank v. Miner*, 50 Ill. 444; *Kennedy v. Shaw*, 38 Ind. 474; *Holt v. Lucas*, 77 Kans. 710, 17 L. R. A. N. S. 203; *Garland v. Plummer*, 73 Me. 397; *Bingham v. Jordan*, 83 Mass. 373; *Wilson v. Milligan*, 75 Mo. 41; *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 442; *Brothers v. Mundell*, 60 Tex. 240; *Baxter v. Smith*, 2 Wash. Terr. 97; *Curtin v. Isaacsen*, (W. Va.) 15 S. E. 171. This results from the peremptory wording of the statute. *Maier v. Davis*, 57 Wis. 212, 15 N. W. 187. The rule that an unrecorded mortgage is void against creditors with notice, is the better doctrine; 2 *Cobbey, Chat. Mort.*, § 617; although at first impression it seems unjust. There may be other creditors of the mortgagor without notice; and to hold that they could seize the property while the creditors with notice could not, would give some a preference and place a premium on ignorance.

In some states, an unrecorded mortgage is void as to one class of persons, (as creditors) whether they have notice or not; while as to others (as subsequent purchasers and mortgagees) it is void only if they take for value and without notice. *Cardenas v. Miller*, 103 Cal. 250, 49 Am. St. 34.

In some states if there are two unrecorded mortgages, the first is absolutely void as against the second if the latter is taken in good faith. *DeCoursey v. Collins*, 21 N. J. Eq. 357.

1. *Eckman v. Munnerlyn*, 32 Fla. 367, 37 Am. St. 109.

2. *Lund v. Fletch*, 39 Ark. 325, 43 Am. Rep. 270; *City B'k v. Goodrich*, 3 Colo. 139; *Simmons v. Jenkins*, 76 Ill. 479; *Rathbun v. Berry*, 49 Kans. 735, 33 Am. St. 389; *Zartman v. First B'k*, 189 N. Y. 267, 12 L. R. A. N. S. 1033; *Bergman v. Jones*, 10 N. Dak. 520, 88 Am. St. 739.

Contra: *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160; *Williams v. Winsor*, 12 R. I. 9; *Peabody v. Landon*, 61 Vt. 313, 15 Am. St. 302. See, also, *Goodrich v. Williams*, 50 Ga. 425.

3. *Greeley v. Winsor*, 1 S. Dak. 117, 36 Am. St. 730.

4. *Benedict v. Renfro*, 75 Ala. 121, Am. Rep. 429.

§ 205. **Mortgages—Priorities.** As a rule, a mortgage cannot interfere with rights¹ acquired prior to its execution; though it is generally superior to subsequent liens² attaching to the property from the acts of the mortgagor, unless the mortgagor acted with the consent³ of the mortgagee. As between unrecorded mort-

1. A mortgage is subject to the lien of a prior execution. 2 Cobbey, Chat. Mort., 916, § 720; *Durbin v. Haines*, 99 Ind. 463.

A mortgagee would not have any right to take the property from the possession of a prior pledgee. 1 Cobbey, Chat. Mort., 607, § 459; *Deeter v. Sellers*, 102 Ind. 458.

2. A mortgage is superior to a lien for repairs on the mortgaged property; 1 Cobbey, Chat. Mort., 605, § 457.

By waiving the right to demand and receive charges in advance of shipment, a carrier exposes itself to risk; and a mortgage on a merry-go-round is not inferior to the carrier's lien even though the mortgagee allows the mortgagor to move the merry-go-round from place to place for use in the state. *Owen v. Burlington Co.*, 11 S. Dak. 153, 74 Am. St. 786.

The mortgage is superior to the lien of a warehouseman on mortgaged goods stored with him by the mortgagor; 1 Cobbey, Chat. Mort., 609, § 461; and generally is superior to the lien of a landlord for rent. 1 Cobbey, Chat. Mort., 610, § 462.

The mortgage is superior to the lien of an agister of mortgaged property. *Charles v. Niggelson*, 15 Ill. App. 17; *Hanch v. Ripley*, 127 Ind. 151; *Reynolds v. Case*, (Mich.) 26 N. W. 838; *Sargent v. Usher*, 55 N. H. 287; *Sallus v. Everett*, 20 Wend. 267; *National B'k v. Jones*, 18 Okla. 310, 12 L. R. A. N. S. 310; *McGhee v. Edwards*, (Tenn.) 11 S. W. 316; *Ingalls v. Vance*, 61 Vt. 582. *Contra*: *Case v. Allen*, 21 Kans. 217; *Smith v. Stevens*, 36 Minn. 303. The agister, knowing that the mortgagor is entitled to possession under the mortgage and that the mortgagor would be expected to care for and to feed the stock, cannot acquire any superior right to the mortgagee, as the agister is not under any obligation to take the stock. *Wright v. Sherman*, (S. Dak.) 52 N. W. 1093.

3. 1 Cobbey, Chat. Mort., 614, § 464; *Vose v. Whitney*, 7 Mont. 385. Consent may be implied. *Watts v. Sweeney*, 127 Ind. 116; *Drummond Co. v. Mills*, 54 Nebr. 417, 69 Am. St. 719, 40 L. R. A. 761; *Bissell v. Pearce*, 28 N. Y. 252; *Williams v. Allsup*, 10 C. B. N. S. 417. The question of the superiority or inferiority of the lien of an agister on mortgaged horses would depend on whether the mortgagee had reason to believe that they were to be boarded or to be kept by the mortgagor. *Master v. Goyne*, 51 Ark. 222; *Howes v. Newcomb*, 146 Mass. 76.

gages, priority is given to that first executed.⁴ Generally as between two or more mortgages on the same subject-matter, priority is given to the first one filed as required by law.⁵

§ 206. **Mortgages—Right to Possession of Property.** As between the mortgagor and the mortgagee the latter, under the common law, has title to the mortgaged property; hence, in the absence of an agreement to the contrary, the right of possession follows the ownership¹ and the mortgagee is entitled to possession² immediately upon the execution of the mortgage;³ or he may take possession at any time thereafter,⁴ though he does not have

4. 2 Cobbey, Chat. Mort., 799, § 602; *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293. Where a statute provides that a mortgage, unless recorded, should be absolutely void as against subsequent mortgagees in good faith, an unrecorded second mortgage prevails over the first. *De Courcey v. Collins*, 21 N. J. Eq. 357.

5. 1 Cobbey, Chat. Mort., 798, § 602. A second mortgage is superior to a first mortgage if the second mortgage is recorded first; *Kelley v. Shepherd*, 79 Ga. 706; unless the instrument on its face shows a contrary intention. 2 Cobbey, Chat. Mort., 1287, § 1039. Thus if a mortgage expressly recites that it is "subject to" a certain other designated mortgage, the terms of which are known to the mortgagee in the mortgage containing such recital, he cannot obtain any precedence over the other mortgage by recording his mortgage first. *Pecker v. Silsby*, 123 Mass. 108.

1. *Brown v. Tanner*, L. R. 3 Ch. App. 597.

2. 1 Cobbey, Chat. Mort., 645, § 478; *Ramsdell v. Tewksbury*, 73 Me. 197; *Fletcher v. Neudeck*, 30 Minn. 125; *Ewing v. Merkley*, 3 Utah, 406.

3. *Ross v. Ross*, 21 Ala. 322; *Kannaday v. McCarron*, 18 Ark. 166; *Wildman v. Radenaker*, 20 Cal. 615; *Clark v. Whittaker*, 18 Conn. 543; *Frank v. Miner*, 50 Ill. 444; *Case v. Winship*, 4 Blackf. 425, 30 Am. Dec. 664; *Bean v. Barney*, 10 Iowa, 498; *Hamlyn v. Boulton*, 15 Kans. 376; *Jamieson v. Bruce*, 6 Gill & J. 72; *Landon v. Emmons*, 97 Mass. 37; *Ferguson v. Clifford*, 37 N. H. 86; *Sanderson v. Price*, 21 N. J. L. 637; *Smith v. Acker*, 23 Wend. 654; *Bates v. Willes*, 1 Handy, 532.

Contra: *Warner v. Beebe*, 47 Mich. 435; *Bowman v. Roberts*, 58 Miss. 126; *Barnett v. Timberlake*, 57 Mo. 499.

4. *Foster v. Perkins*, 42 Me. 168; *Longey v. Leach*, 57 Vt. 377; 2 Cobbey, Chat. Mort., 1091, § 865.

any right to take possession by force,⁵ but, if delivery is refused, should maintain an action in replevin⁶ or in trover⁷ against the mortgagor or against anyone in possession.⁸ It may be shown, however, that there was an agreement for possession to remain with the mortgagor.⁹

Where the mortgagor by agreement is given the right to retain possession, the mortgagee, if there is a further provision in the mortgage to that effect, may have the right before default to deprive him of such possession on the happening of certain contingencies; such as the mortgagor allowing the property to depreciate in value unreasonably,¹⁰ or attempting to remove or to dispose¹¹ of it, or if it be levied upon.¹² A clause frequently is inserted in a mortgage that the mortgagee may take possession if "he feels unsafe and insecure."¹³

5. Thornton v. Cochran, 51 Ala. 415; State v. Boynton, 75 Iowa, 545.

6. 1 Cobbey, Chat. Mort., 654, § 482.

7. 1 Cobbey, Chat. Mort., 693, § 509.

8. Wilson v. Rountree, 72 Ill. 570; Recker v. Kilgore, 62 Ind. 10; Cutler v. Copeland, 18 Me. 127; Braley v. Byrnes, 21 Minn. 482; Chadwick v. Lamb, 29 Barb. 518; Ashley v. Wright, 19 Ohio St. 291; Montgomery v. Kerr, (S. Car.) 1 Hill, 291; Jacoby v. Brigman, (Tex.) 7 S. W. 366.

9. Letcher v. Norton, 5 Ill. 575; Butts v. Privett, 36 Kans. 711; Pierce v. Stevens, 30 Me. 184.

The right of the mortgagor to possession will be implied where there is a provision in the mortgage as to the time when the mortgagee shall have the right to possession; Sherman v. Clark, 24 Minn. 37; Hathaway v. Brayman, 42 N. Y. 322; or a provision that the mortgagor is to keep the property in repair. Babcock v. McFarland, 43 Ill. 381.

10. St. Louis Co. v. Robinson, 10 Mo. App. 588.

11. 1 Cobbey, Chat. Mort., 652, § 481; State Bank v. Keeny, (Mo. App. 1908) 114 S. W. 553; Russell v. Butterfield, 21 Wend. 300; Rindskopf v. Vaughn, 40 Fed. 394.

12. 1 Cobbey, Chat. Mort., 653, § 481; Wilson v. Rountree, 72 Ill. 570.

13. 1 Cobbey, Chat. Mort., 647, § 479; Roy v. Goings, 36 Ill. 361, 36 Am. Rep. 151; Werner v. Bergman, 28 Kans. 65, 42 Am. Rep. 152; Burrill v. Witcomb, 100 Me. 286, 1 L. R. A. N. S. 451; Batsford v. Murphy, 47 Mich. 536; Deal v. Osborne, 43 Minn. 102; Case Wks v.

§ 207. Mortgages—Sale of Property by Mortgagor.

A mortgagor has the right to sell¹ the mortgaged property subject to the mortgage,² the buyer thereby acquiring all the interest of the mortgagor³ but usually nothing more⁴ if he had actual or constructive notice,⁵ that is, only the equity of redemption is transferred.⁶ In most states, by statute, it is a criminal offense to sell mortgaged property without either⁷ the written⁸ consent of the mortgagee, or informing the buyer of the existence of the mortgage.⁹

Marr, 33 Nebr. 215; *Hathaway v. Brayman*, 42 N. Y. 322; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. 711; *Humpfner v. Osborn*, (S. Dak.) 50 N. W. 88; *Gage v. Wayland*, 67 Wis. 566.

1. A sale to the mortgagee is watched closely by courts of equity. *Locke v. Palmer*, 26 Ala. 312; *Hackleman v. Goodman*, 75 Ind. 202; *Phillip v. Hunter*, 22 Mo. 485.

2. 2 *Cobbey*, Chat. Mort., 832, § 628; *Ashmead v. Kellogg*, 23 Conn. 70; *Constant v. Matteson*, 22 Ill. 546; *McFadden v. Hopkins*, 81 Ind. 459; *Waters v. Cass B'k*, 65 Iowa, 234; *Treat v. Gilmore*, 49 Me. 34; *Landon v. Emmons*, 97 Mass. 37; *Daly v. Proetz*, 20 Minn. 411 (Gil. 363); *Witczinski v. Everman*, 51 Miss. 841; *Davis v. Blume*, 1 Mont. 463; *Mechanics' Ass'n v. Conover*, 14 N. J. Eq. 219; *Jacobs v. McCalley*, 8 Oreg. 124; *Millar v. Allen*, 10 R. I. 49; *Newman v. Tyme-son*, 13 Wis. 172, 80 Am. Dec. 735; *Gilmour v. Ewing*, 50 Fed. 656.

3. *McLaughlin v. Smith*, 45 Mich. 277, 7 N. W. 908; *Hathaway v. Brayman*, 42 N. Y. 322, 1 Am. Rep. 524.

4. *Arnold v. Stock*, 81 Ill. 407; *Hale v. Omaha B'k*, 39 N. Y. Super. 207; *Hammond v. Plimpton*, 30 Vt. 333.

A mortgagee, by authorizing a transfer of the property, may lose his lien upon it. 2 *Cobbey*, Chat. Mort., 843, § 637; *Brandt v. Dan'ls*, 45 Ill. 453; *Carter v. Fately*, 67 Ind. 427; *Abbott v. Goodwin*, 20 Me. 408; *Pratt v. Maynard*, 116 Mass. 388; *First B'k v. Weed*, 89 Mich. 357, *Griffin*, Illus. Cas. on Pers. Prop. 169; *Littlejohn v. Pearson*, 23 Nebr. 192; *Roberts v. Crawford*, 54 N. H. 582; *Conkling v. Shelley*, 28 N. Y. 560; *Etheridge v. Hilliard*, 100 N. Car. 250; *Jenckes v. Goffe*, 1 R. I. 511; *Flenniken v. Scruggs*, 15 S. Car. 88; *Field v. Doyon*, 64 Wis. 560; *National B'k v. Hamson*, 5 Q. B. D. 177.

5. 2 *Cobbey*, Chat. Mort. 834, § 629; *Heflin v. Slay*, 78 Ala. 180.

6. *Scott v. Henry*, 13 Ark. 128.

7. *Com. v. Damon*, 105 Mass. 580.

8. *State v. Plaisted*, 43 N. H. 413.

9. *Beard v. State*, 43 Ark. 284. The southern states have given these statutes a wider scope and application than the northern and western states. 2 *Cobbey*, Chat. Mort., 1036, § 797.

§ 208. Mortgages—Renewal. Recording a chattel mortgage is constructive notice for a period no longer than the statute specifies; and at, or immediately before, the expiration of that time, unless the mortgagee is in possession¹⁰ or proceeds to foreclose,¹¹ or litigation is pending¹² in regard to the mortgaged property, he must protect himself by refiling his mortgage.¹³ A renewal, in order to be good as against third persons,¹⁴ must be made in the manner designated by statute; though as between the mortgagor and the mortgagee,¹⁵ and against those who have acquired interests otherwise than for value,¹⁶ the mortgage remains valid without refiling.

§ 209. Mortgages—Breach of Condition. Usually a mortgage may be foreclosed whenever there is a breach of any one of its conditions, such as a default in the payment of one installment¹ of the debt secured. Mort-

10. *Union B'k v. Olum*, 3 N. Dak. 193, 44 Am. St. 533.

11. *Otis v. Sill*, 8 Barb. 102; *Broom v. Armstrong*, 137 U. S. 266.

12. *National B'k v. Sprague*, 21 N. J. Eq. 530; *Corbin v. Kincaid*, 33 Kans. 649; *Carlisle v. Davis*, 9 Ben. 18.

13. 2 *Cobbey*, Chat. Mort. 792, § 597.

14. As purchasers of the mortgaged property; *Dillingham v. Bolt*, 27 N. Y. 198, 4 Abb. Pr. N. S. 221; *Kimball Co. v. Huntington (Wis.)*, 50 N. W. 177; subsequent mortgagees; *Briggs v. Mette*, 42 Mich. 12; or other creditors of the mortgagor. 2 *Cobbey*, Chat. Mort. 789, § 593; *Dunlap v. Epler*, 88 Ill. 82; *First B'k v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. 928.

In some states, persons acquiring adverse rights with notice of the mortgage though not refiled, are subject to it; 2 *Cobbey*, Chat. Mort. 793, § 598; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Meech v. Patchin*, 14 N. Y. 71.

15. 2 *Cobbey*, Chat. Mort. 794, § 598; *Sanford v. Munford*, 31 Nebr. 792; *Fish v. New Y. Co.*, 29 N. J. Eq. 16.

16. *Thompson v. Van Vechten*, 27 N. Y. 568, 6 Bosw. (19 N. Y. Super.) 373, 5 Abb. Pr. 458; *Carlisle v. Davis*, 9 Ben. 18.

1. 2 *Cobbey*, Chat. Mort. 1164, § 943; *Burton v. Tannehill*, 6 Blackf. 470; *Flanders v. Barstow*, 18 Me. 357; *Murray v. Erskine*, 109 Mass. 597; *Leland v. Collier*, 34 Mich. 418; *Baumann v. Cornez*, 8 N. Y. Supp. 480.

There may be other defaults than those of payment; such as failure to insure. *Cassel v. Cassel*, 26 Ind. 90.

gages frequently provide that, on default in the payment of any installment, the entire debt shall at once become due and payable;² but the right given to the mortgagee to take possession upon default in one installment, is an option and not a duty on his part, and he may wait until the maturity of the last installment.³

§ 210. **Mortgages—Possession after Breach.** While at common law the mortgagee is regarded as the owner of the mortgaged property his title is conditional and liable to be divested by the performance of a condition subsequent, that is, by the mortgagor doing whatever the mortgage was given to secure. In event of a default by the mortgagor the condition fails of performance, and the legal title of the mortgagee becomes absolute,⁴ giving him the right to immediate possession,⁵ even though the mortgage provides that the mortgagor shall have possession of the mortgaged property. A mortgagee should take possession within a reasonable * time after default,

2. *Conkey v. Hart*, 14 N. Y. 22.

3. 2 *Cobbey*, Chat. Mort. 1070, § 852; *Chapin v. Whitsett*, 3 Colo. 315; *Wilson v. Rountree*, 72 Ill. 570; *National B'k v. Dean* (Iowa), 53 N. W. 338.

4. 1 *Andrews*, Am. Law (2d ed.) 906; *Heyland v. Badger*, 35 Cal. 404; *McConnell v. People*, 84 Ill. 583; *McCaffrey v. Woodin*, 65 N. Y. 465; *St. Mary's Co. v. National Co.*, 68 Ohio St. 535, 96 Am. St. 677, 64 L. R. A. 845; 2 *Cobbey*, Chat. Mort. 1066, § 849.

Contra: *Kohl v. Lynch*, 34 Mich. 360; *Chapman v. State*, 5 Oreg. 432.

5. *Mervine v. White*, 50 Ala. 338; *Patterson v. Taylor*, 15 Fla. 336; *Love v. Blair*, 72 Ind. 281; *Norris v. Hix*, 74 Iowa, 524; *Brookover v. Esterly*, 12 Kans. 149; *Brown v. Phillips*, 66 Ky. 656; *Hendrickson v. Walker*, 32 Mich. 68; *Spriggs v. Camp*, 2 Speers, 181; *Denno v. Nash*, 60 Vt. 334; *Nichols v. Webster*, 1 Chandl. 203; *Wagoner B'k v. Welch*, 164 Fed. 313.

6. 1 *Cobbey*, Chat. Mort. 686, § 501. What is a reasonable time depends upon circumstances. If the mortgagor, the mortgagee and the mortgaged property are all in the same community, one day after default is reasonable, but two days is held to be unreasonable, unless the day following default is Sunday. *Arnold v. Stock*, 81 Ill. 407. Where effort has not been made for a month after maturity of the

or he will lose his rights as against third persons.⁷

§ 211. **Mortgages—Enforcing Claim.** In some states⁸ the mortgagee must proceed under his mortgage to enforce his claim; but in most states his right of action on the debt is not affected by the fact that he holds a mortgage to secure it,⁹ and he can procure a judgment¹⁰ against the mortgagor, have an execution issued and a levy made on the mortgaged property¹¹ or on any other property¹² of the mortgagor. If the mortgage be invalid for any reason, the right of the mortgagee to proceed on his claim is not affected.¹³ A judgment on the debt¹⁴ does not prevent a subsequent foreclosure of the mortgage.

§ 212. **Mortgages—Termination—Redemption.** The lien of a mortgage may be terminated in many ways, both before and after default, some resulting from the affirmative act of the mortgagor done to accomplish that very purpose, and some resulting by operation of law. The more common methods will be noticed.

debt, to take possession, the diligence required by law is lacking. 1 Cobbey, Chat. Mort., 687, § 502; Travis v. McCormick, 1 Mont. 347. If the mortgagee tries to take possession the day after default and continues his efforts until successful, he has exercised sufficient diligence. Buckley v. Lampett, 24 Ill. 604. If the parties are in different states, more time is allowable. Barbour v. White, 37 Ill. 165.

7. Dunlap v. Epler, 88 Ill. 82. Failure of the mortgagee to take possession promptly does not affect the validity of the mortgage between the parties, and those not acquiring interests for value. Sumner v. McKee, 89 Ill. 127.

8. Barbieri v. Ramelli, 84 Cal. 154.

9. A mortgage adds to the remedies of the creditor; it does not destroy nor bar any existing rights. Elder v. Rouse, 15 Wend. 218.

10. Williams v. Cox, 78 Ala. 325.

11. Emerson v. Knapp, 114 N. Y. Supp. 794.

12. 2 Cobbey, Chat. Mort. 1170, § 948; Taylor v. Cheever, 72 Mass. 146.

13. Whitney v. Willard, 79 Mass. 203.

14. 2 Cobbey, Chat. Mort. 1252, § 1013; Holmes v. Hinkle, 63 Ind. 512.

The title of the mortgagee becomes absolute at common law after default, but equity considers it unjust for the mortgagor to be deprived of his property so summarily, and possibly at a great sacrifice, for what may have been an oversight or mere inability on his part to perform the condition at the exact moment agreed upon; and a court of equity will allow the mortgagor to redeem¹ his property even after default, by paying to the mortgagee, within a reasonable time,² the amount of the debt, interest and costs, so that the latter does not suffer loss. This right of the mortgagor is known as his "equity of redemption."³ An agreement by the mortgagor, at the time of the execution of the mortgage, that the property shall be irredeemable, will not affect his right.⁴

§ 213. Mortgages—Termination—Payment—Tender.
Before default, a performance⁵ of the condition in a mortgage, such as payment⁶ on the day of maturity,

1. 2 Cobbey, Chat. Mort. 1160, § 938; *Landers v. George*, 49 Ind. 309; *Doane v. Garretson*, 24 Iowa, 351; *Kellogg v. Olson*, 34 Minn. 103; *Dabney v. Green*, 14 Va. (4 Hen. & M.) 101.

2. 1 Andrews, Am. Law (2d ed.) 909; *Hatfield v. Montgomery*, 2 Port. 58; *Heyland v. Badger*, 35 Cal. 404; *Hammers v. Dole*, 61 Ill. 307; *Blanchard v. Kenton*, 7 Ky. 451; *Jackson v. Cunningham*, 28 Mo. App. 354; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Patchin v. Pierce*, 12 Wend. 61; *Arnold v. Chapman*, 13 R. I. 586; *Blodgett v. Blodgett*, 48 Vt. 32; *Saxton v. Williams*, 15 Wis. 292; *Foster v. Ames*, 1 Lowell, 313; 2 Cobbey, Chat. Mort. 1262, § 1023. The time within which redemption can be made is regulated by statute in some states. *Winchester v. Ball*, 54 Me. 558.

3. 1 Cobbey, Chat. Mort., 588, § 445; *Davis v. Hubbard*, 38 Ala. 185; *Evans v. Merriken*, 3 Gill & J. 39; *Flanders v. Chamberlain*, 24 Mich. 305; *Leach v. Kimball*, 34 N. H. 568.

4. 1 Cobbey, Chat. Mort. 68, § 73; *Weathersly v. Weathersly*, 40 Miss. 466, 90 Am. Dec. 344; *Bunacleugh v. Poolman*, 3 Daly, 226; *Lavigne v. Naramore*, 52 Vt. 267.

5. *Packard v. Kingman*, 11 Iowa, 219; *Rainbow v. Juggins*, 5 Q. B. D. 138.

6. 2 Cobbey, Chat. Mort., 1103, § 873; *German-Am. Co. v. Humphrey*, 62 Ark. 349, 54 Am. St. 297; *Wallard v. Worthman*, 24 Ill.

makes the mortgage void; and even after a forfeiture, acceptance of payment in full by the mortgagee waives the forfeiture and reverts the title in the mortgagor,⁷ though the rights of the mortgagee are not affected as long as any portion of the indebtedness remains unpaid.⁸ A valid tender⁹ of principal, interests and costs,¹⁰ made before default, will have the effect of discharging a mortgage; and it need not be kept good¹¹ so far as the lien of the mortgage is concerned, the sole remedy of the mortgagee thereafter being a personal action against the mortgagor.¹²

§ 214. **Mortgages—Foreclosure—Effect.** A mortgagee is regarded by the common law as the owner of the mortgaged property; but before default his title is conditional. Default is non-performance of the condition by the mortgagor, at which time, at common law, the title of the mortgagee becomes absolute. Courts of equity,

446; *Bellamy v. Doud*, 11 Iowa, 285; *Nutt v. Humphrey*, 32 Kans. 100; *Breckenridge v. Ormsby*, 24 Ky. 236, 19 Am. Dec. 71; *Sumner v. Bachelder*, 30 Me. 39; *Banter v. Spencer*, 33 Mich. 325; *Heisler v. Aultman*, 56 Minn. 454, 45 Am. St. 489; *Gale v. Mensing*, 20 Mo. 461, 64 Am. Dec. 197; *Leighton v. Shapley*, 8 N. H. 359; *Chapman v. Hunt*, 18 N. J. Eq. 414.

7. 2 *Cobbey*, Chat. Mort. 1117, § 887; *Goodman's Ex'rs v. Pledger's Adm'rs*, 14 Ala. 114; *Heyland v. Badger*, 35 Cal. 404; *Parks v. Hall*, 19 Mass. 206; *Porter v. Parmley*, 52 N. Y. 185; *Blodgett v. Blodgett*, 48 Vt. 32; *Moak v. Bourne*, 13 Wis. 514.

8. *Morrison v. Judge*, 14 Ala. 182; *Machette v. Wanless*, 1 Colo. 225; *Dreyfus v. Cage*, 62 Miss. 733; *Emmons v. Dowe*, 2 Wis. 322; *Schuelenburg v. Martin*, 1 McCrary, 348.

The rights of a mortgagee are not affected by the bankruptcy of the mortgagor. *Bentley v. Wells*, 61 Ill. 59. See Federal Bankruptcy Act of 1898, § 57, c.

9. *Rice v. Kahn*, 70 Wis. 33.

10. *Shattuck v. Cole* (Mich.), 52 N. W. 69.

11. 2 *Cobbey*, Chat. Mort. 1119, § 888; *Tompkins v. Batie*, 11 Nebr. 147, 38 Am. Rep. 361; *Thomas v. Seattle Co.*, 48 Wash. 560, 15 L. R. A. N. S. 1164.

12. 2 *Cobbey*, Chat. Mort. 1120, § 883; *Eslow v. Mitchell*, 26 Mich. 500; *Bartal v. Lope*, 6 Oreg. 321.

however, regarded the common law as being too harsh, and allowed the mortgagor to redeem the property within a reasonable time; but this equitable rule in turn frequently worked injustice, as, during the period allowed for redemption, the mortgagee, though the legal owner of the property, might find his use or a disposition of it seriously restricted, as the mortgagor by redemption at any time could take the property from anyone in possession. To remedy this the mortgagee is allowed to foreclose the mortgage, that is, cut off this right of redemption, which must be by some adequate proceeding.¹ It will be noticed that there are three steps before the title of the mortgagor is completely taken away. First, giving a mortgage transfers the legal title theoretically but conditionally to the mortgagee. Second, default makes the legal title absolute in the mortgagee, but leaving an equitable title in the mortgagor. Third, foreclosure, or lapse of time, finally bars this equitable title. A foreclosure cuts off not only the mortgagor's equity of redemption but also all junior mortgages.²

After default a mortgagee may have three* remedies at his disposal, any one or two or all of which may be pursued at the same time;⁴ he can bring an action at law to recover the debt; if not in possession, he can bring an action at law to recover the mortgaged property; and

1. 2 Cobbey, Chat. Mort. 1259, § 1021; *Landers v. George*, 49 Ind. 309, Griffin, Illus. Cas. on Pers. Prop. 198; *King v. Van Vleck*, 109 N. Y. 363.

2. 2 Cobbey, Chat. Mort. 1161, § 940; *Wylder v. Crane*, 53 Ill. 490; *Faeth v. Leary*, 23 Nebr. 267; *Tallman v. Smith*, 39 Barb. 390.

3. 2 Cobbey, Chat. Mort. 1168, § 947; *Tyson v. Weber*, 81 Ala. 470.

4. *Pettibone v. Stevens*, 15 Conn. 19; *Juchter v. Boehm*, 63 Ga. 71; *Morris v. Tillson*, 81 Ill. 621; *Lorch v. Aultman*, 75 Ind. 162; *Downing v. Palmateer*, 17 Ky. 64; *Hepburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Thurber v. Jewett*, 3 Mich. 295; *Ayres v. Wattson*, 57 Pa. St. 360; *Satterwhite v. Kennedy*, 3 Strobh. 457; *Johnson v. Murphy*, 17 Tex. 216; *Chapman v. Clough*, 6 Vt. 123; *Ambler v. Warwick*, 28 Va. (1 Leigh) 195; *Riemer v. Schlitz*, 49 Wis. 272.

he can foreclose. Sometimes statutes⁵ provide the method. The two⁶ common forms of foreclosure are by a sale of the property, or by a proceeding in court.

§ 215. **Mortgages—Foreclosure by Sale.** The customary method for foreclosure is for the mortgagee to take possession of the property and to sell it⁷ this being more speedy and effectual⁸ than a proceeding in court. Reasonable notice⁹ of the time of sale should be given, unless there is an express stipulation either as to time, or that there may be a sale without notice.¹⁰ A sale is valid whether made publicly or privately,¹¹ provided it is fair; but if the sale is private, the mortgagee would be responsible for any injury resulting from the sale not having been public.¹² The mortgagee may become the purchaser;¹³ but if he takes advantage of his position

5. 2 Cobbey, Chat. Mort. 1122, § 889; *Cederholm v. Loofborrow* (Ida.), 9 Pac. 641; *Rubey v. Missouri Co.*, 21 Mo. App. 159; *Commercial B'k v. Davidson*, 18 Oreg. 57.

6. *Monroe v. Hamilton*, 47 Ala. 217; *Wilson v. Brannon*, 27 Cal. 258; *Hackleman v. Goodman*, 75 Ind. 202; *Holridge v. Gillespie*, 2 Johns. Ch. 30.

7. *Broadhead v. McKay*, 46 Ind. 595; *Spalding v. Mattingly* (Ky.), 1 S. W. 488.

8. *Briggs v. Oliver*, 68 N. Y. 336.

9. Where the mortgagor is aware that the debt is overdue eight months, thirteen days is reasonable. *Willson v. Brannon*, 27 Cal. 258.

10. *Reynolds v. Thomas*, 28 Kans. 810.

11. 2 Cobbey, Chat. Mort. 1195, § 966; *Bryant v. Carson Co.*, 3 Nev. 313, 93 Am. Dec. 403. The mortgage may provide for a private sale; 2 Cobbey, Chat. Mort. 1201, § 792; *Wilson v. Brannon*, 27 Cal. 258; and without notice; but even then it must be made fairly. *Harris v. Lynn*, 25 Kans. 281; *Ballou v. Cunningham*, 60 Barb. 425.

12. *McConnell v. People*, 84 Ill. 583; *Denny v. Faulkner*, 23 Kans. 39; *Coe v. Cassidy*, 72 N. Y. 133.

13. 2 Cobbey, Chat. Mort. 1202, § 973; *Syfers v. Bradley*, 118 Ind. 345; *French v. Powers*, 120 N. Y. 128; *Maxwell v. Newton*, 65 Wis. 261. See, also, *Mills v. Williams*, 16 S. Car. 593.

Contra: *Imboden v. Hunter*, 23 Ark. 622; *Hungate v. Reynolds*, 72 Ill. 425; *Alger v. Farley*, 19 Iowa, 518; *Korns v. Shaffer*, 27 Md. 83.

to purchase for less than the value of the property he may be compelled to account¹⁴ for its full value.

If a sale does not produce enough to pay the debt, costs and expenses, the mortgagor is personally liable for the deficiency.¹⁵

§ 216. **Mortgages—Foreclosure in Equity.** A mortgage may be foreclosed by an action in equity;¹⁶ and it must be so foreclosed if it is an equitable¹⁷ one.

If, after foreclosure and satisfaction of the indebtedness secured, with interest and costs, a surplus remains in the hands of the mortgagee, it belongs to the mortgagor.¹⁸

§ 217. **Release.** A Release is a gratuitous discharge of an existing obligation or right of action, by the per-

14. *Hall v. Ditson*, 5 Abb. N. Cas. 193, 55 How. Pr. 19; *Beard v. Westerman*, 32 Ohio St. 29; *Boyd v. Beaudin*, 54 Wis. 193.

If the mortgagee purchases, the burden is on him to show that the sale was fair. 2 *Cobbey*, Chat. Mort., 1203, § 973; *Wygall v. Bigelow*, 42 Kans. 477; *Black v. Hair*, 2 Hill Eq. 622; *Lyon v. Jones*, 25 Tenn. 533. The mortgagor will be bound if he consents to a purchase by the mortgagee. *Goodell v. Dewey*, 100 Ill. 308; *Emmons v. Hawn*, 75 Ind. 356; *Gear v. Schrel*, 57 Iowa, 666.

15. 2 *Cobbey*, Chat. Mort. 1221, § 988; *Lee v. Fox*, 113 Ind. 98; *National B'k v. Holman*, 31 S. Car. 161.

16. 2 *Cobbey*, Chat. Mort. 1172, § 950; *Monroe v. Hamilton*, 47 Ala. 217; *Wilson v. Brannan*, 27 Cal. 258; *Brown v. Greer*, 13 Ga. 285; *McCauley v. Rogers*, 104 Ill. 578; *Blakemore v. Taber*, 22 Ind. 466; *Packard v. Kingman*, 11 Iowa, 219; *Rubey v. Missouri Co.*, 21 Mo. App. 159; *Briggs v. Oliver*, 68 N. Y. 336; *Commercial B'k v. Davidson*, 18 Oreg. 57. See however, *Boston W'ks v. Montague*, 108 Mass. 248.

17. In an equitable mortgage there are no words of alienation which justify the mortgagee in seizing the property. *Davis v. Childers*, 45 S. Car. 133, 55 Am. St. 757.

If there has been a substitution of property, it may be necessary to go into equity to reach the substituted property. *Marx v. Davis*, 56 Miss. 745.

18. *First B'k v. Wilbur*, 16 Colo. 316; *McConnell v. People*, 84 Ill. 583; *Wygall v. Bigelow*, 42 Kans. 447, 16 Am. St. 495; *Forbes v. Parker*, 33 Mass. 462, *Griffin*, Illus. Cas. on Pers. Prop. 184; *Stromberg v. Lindberg*, 25 Minn. 513; *Leach v. Kimball*, 34 N. H. 563; *Bird v. Davis*, 14 N. J. Eq. 474.

son entitled to enforce it. A covenant not to sue, unlimited in time and scope, operates as a release.¹⁹

A release effects a transfer of property. Thus, if A. hold a claim against X. for money loaned, and A. without consideration gives X. a signed and sealed release of the claim, it is a transfer of A.'s chose in action to X., being in effect, a gift of sufficient property to cause X. to cease being a debtor to A.

A release may result from the cancellation, or destruction²⁰ of a negotiable instrument²¹ by the holder thereof, or by its surrender²² to the maker, if done with that intention. A remission, as of a fine or forfeiture, is also in effect a release; and a pardon for a crime will release a penalty imposed for its commission.

§ 218. **Gifts—Definition.** A Gift, in its broadest sense, is a transfer of property, services, or rights without consideration. In its narrow sense, it is a gratuitous, executed transfer of ownership, absolute or limited, or of rights, from one existing person to another. Gifts, in the broadest sense, include gifts in the narrow sense and bequests. Gifts can be made of land; but as all transfers of land are formal and made by a deed, which usually imports a consideration, such gifts are governed by the laws of real property and are not within the scope of this work. The word "gift"¹ is applied also to the

19. *Flinn v. Carter*, 59 Ala. 364; *Guard v. Whiteside*, 13 Ill. 7; *Clopper v. Union B'k*, 7 Harr. & J. 92, 16 Am. Dec. 294; *Hastings v. Jackson*, 7 Mass. 153, 5 Am. Dec. 34; *Stibbins v. Niles*, 25 Miss. 267; *Line v. Nelson*, 33 N. J. L. 358; *Harrison v. Close*, 2 Johns. 448, 3 Am. Dec. 444; *Stinson v. Moody*, 48 N. Car. 53; *Thirston v. James*, 6 R. I. 103; *Ayliff v. Scrimshaire*, 1 Show. 46, 89 Eng. Reprint, 438.

20. *Blade v. Noland*, 12 Wend. 173.

21. *Ogden*, Neg. Inst. 171, § 184.

22. *Larkin v. Hardenbrook*, 90 N. Y. 333.

1. In the civil law a gift is known as a "donation."

subject-matter² of the transfer, and to the act of transferring.³

§ 219. **Gifts—Distinctions.** In most of its essential elements a gift resembles a transfer of property under a contract, its chief distinctions from a sale or exchange being the absence⁴ of consideration and the necessity of delivery; a sale or exchange requiring a consideration, and immediate delivery not being requisite. A gift is distinguished from a bequest in that by gift the ownership passes directly to the donee, delivery is necessary, and the transaction is informal;⁵ while a bequest does not become effective until the death of the testator, and even then the subject-matter must pass through the hands of the personal representative of the testator, and it is indispensable that a will be executed with certain formalities.⁶

§ 220. **Gifts—Elements.** The essential elements of a gift in its narrow sense are: two parties possessing sufficient capacity, a subject-matter, absence of consideration, delivery, intention to transfer title, and consent, which must be mutual and genuine.

§ 221. **Gifts—Parties—Capacity.** At least two⁷ existing⁸ persons must participate in a gift, in the narrow

2. Thornton, Gifts, 2, § 2.

3. Hynson v. Terry, 1 Ark. 83. The subject of gifts is almost as broad as that of contracts.

4. Seymour v. Seymour (N. Y.), 28 App. Div. 495; App. of Fassett, 167 Pa. St. 443, Van Zile, Illus. Cas. in Personalty, 116; 2 Blacka. Comm. 439. See, also, Faxon v. Durant, 50 Mass. 339.

5. Kenistone v. Sceva, 54 N. H. 24; Devlin v. Farmer, 16 Daly, 98.

6. Vandor v. Roach, 73 Cal. 614.

7. Thornton, Gifts, 68, § 79.

8. A dead person cannot make a gift. Nicholas v. Adams, 2 Whart. 17. A gift cannot be made to a dead person; Thornton, Gifts, 55, § 64; Hayne's Case, 12 Coke, 113; to a corporation before it is formed; Suc. of Hardesty, 73 La. (22 La. Ann.) 332; or to an unborn child. Dupree v. Dupree, 45 N. Car. 164.

sense, the person making it being known as the donor, and the recipient as the donee. The donor must possess sufficient natural and legal capacity.⁹ However, neither the donor nor the donee need be a natural person; and a state, unless restricted by a constitutional limitation,¹⁰ may make a gift. Thus pensions¹¹ granted by the United States are gifts.¹² A municipal corporation, however, unless authorized by its charter or by a statute,¹³ cannot make a gift;¹⁴ nor can a private corporation make

9. *Sass v. McCormack*, 62 Minn. 234; *Riggs v. American Soc.*, 95 N. Y. 203. An infant is not bound by his gift any more than by his contract; *Thornton, Gifts*, 48, § 52; 2 Blacks. Comm. 441; *Boruff v. Stipp*, 126 Ind. 32; and can recover the subject matter. At common law a gift *inter vivos* could not be made from a husband to his wife, as all of her personal property was his, and if she acquired property by gift, the title thereto instantly was transferred to him by operation of law; *Raymond v. Sellick*, 10 Conn. 480; but the beneficial interest might be transferred through the medium of a third person; and equity supported gifts between husband and wife. *Roman C. O. A. v. Strain*, 2 Bradf. Surr. 84. However, at common law, a wife could make a gift *causa mortis* if not objected to by her husband. *Jones v. Brown*, 34 N. H. 439; *Harris v. Clark*, 2 Barb. 94, *aff'd* 3 N. Y. 98.

A father can make a gift to his daughter. *Kellogg v. Adams*, 51 Wis. 138, 37 Am. Rep. 815, *Pattee, Illus. Cas. in Personality*, 195.

10. *Patty v. Colgan*, 97 Cal. 251, 18 L. R. A. 744.

11. A Pension is a periodical allowance granted by a state or through its agency, usually for services rendered, and most commonly to a soldier or to a sailor (see *Morse v. Robertson*, 9 Hawaii, 195); but sometimes given by a municipality to firemen and policemen.

12. *Thornton, Gifts*, 2, § 2. Pension payments can be withheld at discretion; *U. S. v. Teller*, 107 U. S. 64; although payable from a general relief fund created by a monthly deduction from the compensation of the pensioner prior to his retirement. *Macfarland v. Bieber* (App. D. C. 1909), 37 Wash. Law Rep. 95.

13. *Booth v. Woodbury*, 32 Conn. 118; *Clark Co. v. Lawrence*, 63 Ill. 32; *Sperry v. Horr*, 32 Iowa, 184; *Thompson v. Pittson*, 59 Me. 545; *Stetson v. Kempton*, 18 Mass. 272; *Dayton v. Rounds*, 27 Mich. 32; *Kunkle v. Franklin*, 13 Minn. 127; *Bowles v. Landaff*, 59 N. H. 164; *State v. Richland*, 20 Ohio St. 362; *Hilbish v. Catherman*, 64 Pa. St. 154; *Flske v. Hazard*, 7 R. I. 438; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

14. *Thornton, Gifts*, 58, § 68; *Washingtonian Home v. Chicago*, 157 Ill. 414, 39 L. R. A. 798; *Tash v. Adams*, 64 Mass. 253; *Att'y-Gen'l*

a gift unless authorized by its charter.¹⁵ The capacity required in the donee may be much less than that required in the donor, the former generally having capacity to accept a gift manifestly for his benefit.¹⁶

§ 222. **Gifts—Subject Matter.** Generally every species of property capable of actual or constructive delivery, may be the subject of gift,¹ and a gift can be made of the use of property.² Gifts, however, are not restricted to property. They can be made of services, which, if performed gratuitously, cannot be made the basis of a subsequent legal claim.³

v. Batley, 29 L. J. N. S. 392. A municipality cannot make a donation for a Fourth of July celebration for its inhabitants. Hood v. Lynn, 83 Mass. 103.

15. Thornton, Gifts, 56, § 65; Smith v. Woodville Co., 66 Cal. 398; New York v. Ketchum, 27 Conn. 170; Illinois Co. v. Hough, 91 Ill. 62; Maux Co. v. Branegan, 40 Ind. 361; Citizens' B'k v. Elliott, 55 Iowa, 104; Frankfort B'k v. Johnson, 24 Me. 490; Salem B'k v. Gloucester B'k, 17 Mass. 1; Jones v. Morrison, 31 Minn. 140; Bennett v. St. Louis Co., 19 Mo. App. 349; Ogden v. Murray, 39 N. Y. 202; Loan Ass'n v. Stonemetz, 29 Pa. St. 534; Minor v. Mechanics' B'k, 26 U. S. 46; Tompkinson v. South R'y, 35 Ch. D. 635. This is true even though the act might be sanctioned by a majority of the stockholders. Polar Lodge v. Polar Lodge, 67 La. (16 La. Ann.) 52.

16. Hamden v. Rice, 24 Conn. 350; Miller v. Chittenden, 2 Iowa, 315; Malone v. Lebus, 116 Ky. 975, 25 Ky. Law Rep. 1146; Williams v. Western Lodge, 89 La. (38 La. Ann.) 620; Vansant v. Roberts, 3 Md. 119; Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155; Sargent v. Cornish, 54 N. H. 18; De Camp v. Dobbins, 31 N. J. Eq. 671; Jackson v. Pike, 9 Cow. 69; Castleton v. Langdon, 19 Vt. 210; McDonogh v. Murdock, 56 U. S. 367, 14 L. ed. 732.

1. Page v. Lewis, 89 Va. 1, 37 Am. St. 848, 31 Am. Law Reg. 662, 18 L. R. A. 170. A person, by paying the debt of another gratuitously, makes a gift to the debtor.

2. Hanner v. Winburn, 42 N. Car. 142. A bailment for the sole benefit of the bailee is a gift of this character.

3. Thornton, Gifts, 82, § 101; St. Joseph's Soc. v. Wolpert, 80 Ky. 86, 3 Ky. Law Rep. 573; White v. Jones, 65 La. (14 La. Ann.) 681; Force v. Haines, 17 N. J. L. 385; Bartholomew v. Jackson, 20 Johns. 28; Hill v. Williams, 59 N. Car. 242; Vestry v. Barksdale, 1 Strobb. Eq. 197; Taylor v. Taylor, 69 Tenn. 83; Harris v. Currier, 44 Vt. 468. A bailment for the sole benefit of the bailor is a gift of services by

§ 223. **Gifts—Absence of Consideration.** One of the most essential elements of a gift is the absence of consideration.⁴ If a consideration appears,⁵ the transaction is not a gift; but the fact that the consideration may be inadequate does not make the transaction a gift.⁶

§ 224. **Gifts—Delivery.** Another most important element of a gift is delivery;⁷ for if the donor retain any right or interest in the subject-matter, there is no gift.⁸ As long as the donor has some control over the property, there remains to him a *locus penitentie*⁹ (a place of repentance) and he is not prevented from changing his mind and making other disposition of it; as there

the bailee. A gift may be made of services although the donor is insolvent. *Buckley v. Dunn*, 67 Miss. 710. Thus, while a father is entitled to the services of his minor child, the father though insolvent can make a gift to such child of the child's services. *Lackman v. Wood*, 25 Cal. 147; *Atwood v. Holcomb*, 39 Conn. 270; *Wambold v. Vick*, 50 Wis. 456. See, also, *Carpenter v. Franklin*, 89 Tenn. 142. The father will not be entitled to the child's wages thereafter earned; nor can such wages be reached by the father's creditors.

4. *Jackson v. Twenty-third Co.*, 15 Jones & S. (47 N. Y. Super.) 85.

5. A bounty offered by a state for killing or destroying coyotes is not a gift, as there is a consideration, namely, the rendition of services. *Ingram v. Colgan*, 106 Cal. 113, 46 Am. St. 221.

6. *Thornton, Gifts*, 4, § 5. Where a man executed his note for \$10,000 in order to have a child named for him, there is a consideration for the note, and it is not a gift. *Wolford v. Powers*, 85 Ind. 294.

7. 2 Blacks. Comm. 441; *Hansell v. Bryan*, 19 Ga. 167; *Varley v. Sims*, 100 Minn. 331, 117 Am. St. 694, 8 L. R. A. N. S. 828.

The question of delivery has occupied the attention of the courts more than all the other elements of a gift combined. *Thornton, Gifts*, 104, § 123.

8. *Sims v. Sims*, 2 Ala. 117; *Burton v. Bridgeport B'k*, 52 Conn. 398, 52 Am. Rep. 602; *Liebe v. Battman*, 33 Oreg. 241, 72 Am. St. 705. Where the owner of a horse in Kentucky delivered it with the statement that if he never returned, the person to whom it was delivered was to have the horse, but if the donor returned, it was to be re-delivered, and the donor died in Missouri, it was held that this did not constitute a gift because the donor retained the right to demand the return of the property. *Walden's Adm'rs v. Dixon*, 21 Ky. 170.

9. *Pennington v. Gittings*, 2 Gill & J. 208, 4 Gray, Cas. on Prop. 96.

is no consideration, a court would not be authorized in compelling him to carry out his intention.¹⁰ The requirement of delivery is not excused by the fact that the donor is physically incapable of making it,¹¹ or that death prevented it,¹² or that it would be unseemly for the donee to take possession. Thus, if a dying woman were to make a gift of the bed upon which she was lying, it would not be complete without delivery, although the dying woman might be incapable of delivering possession and the donee would subject himself to the severest criticism by taking the bed from under the donor.¹³ For the reason that delivery is required, a gift cannot be made to take effect in the future,¹⁴ as where a person says he makes a gift but retains the right to control the property during his lifetime.¹⁵

10. *Weaver v. Weaver*, 132 Ill. 237, 74 Am. St. 173.

11. *Delmotte v. Taylor*, 1 Redf. Surr. 417.

12. *Hooper v. Goodwin*, 1 Wills. Ch. 212, 1 Swanst. 486.

13. *Turner v. Brown*, 6 Hun (13 N. Y. Supr.) 331.

14. *Thornton, Gifts*, 66, § 76; *Rood, Wills*, 9, § 20; *Hynson v. Terry*, 1 Ark. 83; *Bruce v. Squires*, 68 Kans. 199; *Hunt v. Davis* 20 N. Car. 36; *Chevallier v. Wilson*, 1 Tex. 161; *Barker v. Barker*, 43 Va. (2 Gratt.) 344; *Desrochers v. Roy*, 18 Quebec Super. Ct. 70. A soldier, before going to the front, delivered promissory notes to the young lady to whom he was engaged to be married, saying that if he never came back he wanted her to have them. This was not sufficient to constitute a gift, as it was not to take effect unless he failed to return. *Linsenbiger v. Gourley*, 56 Pa. St. 166.

A promise to give without present delivery is an agreement without consideration, *nudum pactum*, and void. *Thornton, Gifts*, 64, § 74; *Walker v. Crews*, 73 Ala. 412; *Robson v. Jones*, 3 Del. Ch. 51; *Ross v. Walker*, 44 Fla. 704; *Gammon Sem. v. Robbins*, 128 Ind. 85; *Gray v. Nelson*, 77 Iowa, 63; *Rodemer v. Rettig*, 114 Ky. 634, 24 Ky. Law Rep. 1474; *Bush v. Decuir*, 62 La. (11 La. Ann.) 503; *Bath Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. 382; *Cox v. Hill*, 6 Md. 274; *Sanilac Co. v. Aud.-Gen.*, 68 Mich. 659; *McWillie v. Van Vactor*, 35 Miss. 428, 72 Am. Dec. 127; *Bennett v. Cook*, 28 S. Car. 353.

15. *Robson v. Jones*, 3 Del. Ch. 51; *Duke's Ex'rs v. Dyches*, 2 Strobb. Eq. (16 S. Car. Eq.) 353n., 5 Gray, Cas. on Prop. 145. Where the donor showed the donee an assigned certificate of deposit but

Delivery by the donor to his agent with instructions to deliver to the donee, is insufficient if the donee is not given possession in the lifetime of the donor,¹⁶ as possession by the agent of the donor is, in law, possession by the donor himself, so that he retains control¹⁷ over the article. Death of the donor would revoke the agency,¹⁸ and the agent would not have any authority to make delivery afterwards.¹⁹ Delivery to a third person will be sufficient if such third person occupies the relation of trustee or bailee for the donee,²⁰ all that is required being that the legal title be transferred to the third person²¹ so that he holds the property for the

said he wanted to keep it and to draw interest while he lived, the delivery was insufficient. *Harris Co. v. Miller*, 190 Mo. 640, 1 L. R. A. N. S. 790.

16. *Rood, Wills*, 17, § 31; *Stephenson v. King*, 81 Ky. 425; *Wilcox v. Matteson*, 53 Wis. 23.

17. *Taylor v. Harmison*, 179 Ill. 137.

18. *Thornton, Gifts*, 94, § 116; *Rood, Wills*, 17, § 31; *Knight v. Tripp*, 121 Cal. 674; *Taylor v. Harmison*, 179 Ill. 137; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Furenes v. Elde*, 109 Iowa, 511, 77 Am. St. 545; *Thompson v. Dorsey*, 4 Md. Ch. 149; *Sessions v. Moseley*, 58 Mass. 87; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Craig v. Kittredge*, 46 N. H. 57; *Johnson v. Williams*, 68 How. Pr. 233; *Windows v. Mitchell*, 5 N. Car. 127; *Hamor v. Moore*, 8 Ohio St. 239; *Deneff v. Helms*, 42 Oreg. 161; *Clapper v. Frederick*, 199 Pa. St. 609; *Gilmore v. Whitesides*, *Dudley Eq.* 14, 31 Am. Dec. 563; *Sims v. Walker*, 27 Tenn. 503; *Peck v. Rees*, 7 Utah, 467, 13 L. R. A. 714; *Dickeschied v. Exchange B'k*, 28 W. Va. 340; *Foster v. Walker*, 32 Nova Sco. 156; *Treas. Solic. v. Lewis* [1900], 2 Ch. 812, 69 L. J. Ch. 833, 83 L. T. Rep. N. S. 139, 48 Wkly. Rep. 694.

19. *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587.

20. *Woodburn v. Woodburn*, 123 Ill. 608; *Baker v. Williams*, 34 Ind. 547; *Bath Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. 382; *Turner v. Estabrook*, 129 Mass. 425, 37 Am. Rep. 371, 4 Gray, Cas. on Prop. 112; *Varley v. Sims*, 100 Mo. 331, 117 Am. St. 694, 8 L. R. A. N. S. 828. Delivery to a mother for her six-year-old boy, is sufficient. *Gass v. Simpson*, 44 Tenn. 288, 298. Making a deposit in a savings-bank in the name of another, informing the latter and telling where the book is, is sufficient delivery to the bank as trustee. *Blasdel v. Locke*, 52 N. H. 238.

21. *Lane v. Ewing*, 31 Mo. 75; *Gilchrist v. Stevenson*, 9 Barb. 9; *Cressman's App.* 42 Pa. St. 147; *Duffell v. Noble*, 14 Tex. 640; *Jones v. Obenchain*, 51 Va. (10 Gratt.) 259; *Searle v. Law*, 15 Sim. 95.

donee and not for the donor, and that the donor has relinquished all dominion over it²² and is not in a position to require this third person to return it to him. Thus, where notes were delivered to a third person with directions to hand them to the donee when the latter called for them, done pursuant to previous agreement with the donee, the delivery was sufficient.²³

A chose in action may be the subject of gift;¹ but being incorporeal must be delivered by the symbol which represents it.² However, the donor's own note³ can-

22. *Marshall v. Russell*, 93 Tenn. 261.

23. *School Dist. v. Stocking*, 128 Mo. 672, 60 Am. St. 576, 37 L. R. A. 406.

1. *Thornton, Gifts*, 232, § 267.

2. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, aff'd, 170 U. S. 36, 42 L. ed. 939.

A gift can be made of a third person's promissory note; *Jones v. Deyer*, 16 Ala. 221; *Druke v. Helken*, 61 Cal. 346, 44 Am. Rep. 553; *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328; *Kilby v. Godwin*, 2 Del. Ch. 61; *Ashbrook v. Ryon*, 65 Ky. 228, 92 Am. Dec. 481; *Wing v. Merchant*, 57 Me. 383, *Lawson, Cas. Pers. Prop.* 321; *Grover v. Grover*, 41 Mass. 261, 35 Am. Dec. 319; *Blazo v. Cochrane*, 71 N. H. 585; *Westerlo v. DeWitt*, 36 N. Y. 340; *Royston v. McCulley* (Tenn. Ch.), 52 L. R. A. 899; *Holley v. Adams*, 16 Vt. 206; or check; *Thornton, Gifts*, 296, § 317; *Burke v. Bishop*, 78 La. (27 La. Ann.) 465, 21

3. *Rood, Wills*, 16, § 29; *Tracy v. Alvord*, 118 Cal. 654; *Camp v. Shaw*, 160 Ill. 425; *Parish v. Stone*, 31 Mass. 198, 25 Am. Dec. 378; *Flint v. Pattee*, 33 N. H. 520, 66 Am. Dec. 742; *Re James*, 146 N. Y. 78, 48 Am. St. 774; *Hamor v. Moore*, 8 Ohio St. 239; *Luebke's Est.* 179 Pa. St. 447; *Shugart v. Shugart*, 111 Tenn. 179, 102 Am. St. 777; *Tate v. Hilbert*, 2 Ves. Jr. 111, 4 Bro. Ch. 286, 2 Rev. Rep. 175, 30 Eng. Reprint, 548.

If the donee negotiates the note to a holder for value without notice, the donor can be compelled to pay the holder; *Ogden, Neg. Inst.* 65, § 68; but, in that event, the donor can recover the amount from the donee. *Richardson v. Richardson*, 148 Ill. 563, 28 L. R. A. 305. If, however, the donee indorses the note to a holder for value without notice in accordance with instructions from the donor, the note is valid although not due or paid at the time of the death of the donor; and the amount of the note cannot be deducted from a legacy by the donor to the donee. *Armstrong v. Armstrong*, 142 Ill. App. 507.

not be made the subject of a gift,⁴ as it is in effect but a promise to make a gift in the future and, being without

4. *Thresher v. Dyer*, 69 Conn. 404; *Callender v. Callender*, 24 Ky. Law Rep. 1145; *Stauffer v. Morgan*, 80 La. (39 La. Ann.) 632; *Conrad v. Manning*, 125 Mich. 77; *Montpellier Sem. v. Smith*, 69 Vt. 382.

Am. Rep. 567; *Rhodes v. Childs*, 64 Pa. St. 18; *Clement v. Cheesman*, 27 Ch. D. 631, 54 L. J. Ch. 158, 33 Wkly. Rep. 40; a bond; *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429; *Kiff v. Weaver*, 94 N. Car. 274, 55 Am. Rep. 601; a mortgage; *Hackney v. Vrooman*, 62 Barb. 650; *Kiff v. Weaver*, 94 N. Car. 274, 55 Am. Rep. 601; or a certificate of deposit. *Thornton, Gifts*, 306, § 323; *McCabe's Est.* 10 Pa. St. 391; *Brooks v. Brooks*, 12 S. Car. 422; *Taylor v. Taylor*, 56 L. J. Ch. 597.

A gift can be made of a deposit receipt although it states that it is not transferable; *Cassidy v. Belfast Co.*, L. R. 22 Ir. 68; and negotiable instruments need not be indorsed. *Walker v. Crews*, 73 Ala. 412; *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507; *Druke v. Helken*, 61 Cal. 346, 44 Am. Rep. 553, *Conner v. Root*, 11 Colo. 183; *Camp's App.* 36 Conn. 88, 4 Am. Rep. 39; *Hill v. Sheibley*, 64 Ga. 529; *Bingham v. Stage*, 123 Ind. 281; *Ashbrook v. Ryon*, 65 Ky. 228, 92 Am. Dec. 481; *Brown v. Crafts*, 98 Me. 40; *Grover v. Grover*, 41 Mass. 261, 35 Am. Dec. 319; *Letts v. Letts*, 73 Mich. 138; *Johnson v. Holst*, 86 Minn. 496; *Blazo v. Cochrane*, 71 N. H. 585; *Corle v. Monkhouse*, 50 N. J. Eq. 537; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. 758, 11 L. R. A. 684; *Kiff v. Weaver*, 94 N. Car. 274, 55 Am. Rep. 601, 34 Alb. Law J. 11; *Rote v. Warner*, 17 Ohio Circ. Ct. 350, 9 Ohio Circ. Dec. 540; *Deneff v. Helms*, 42 Ore. 151; *Gourley v. Linsenbigler*, 51 Pa. St. 345; *Hopkins v. Manchester*, 16 R. I. 663, 7 L. R. A. 387; *Clinton v. McKeown*, 39 S. Car. 21; *Richardson v. Adams*, 18 Tenn. 273; *Caldwell v. Renfrew*, 33 Vt. 213; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. 848, 18 L. R. A. 170; *Clayton v. Pierson*, 55 W. Va. 167; *Basket v. Hassel*, 107 U. S. 602; *Purdham v. Murray*, 9 Ont. App. 369; *Veal v. Veal*, 27 Beav. 303.

A gift can be made of a debt, not evidenced in writing, owing the donor by a third person, by delivery of a written assignment thereof; *Sprague v. Walton*, 145 Cal. 228; *Drew v. Hagerty*, 81 Me. 231, 10 Am. St. 255, 3 L. R. A. 230; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Matson v. Abbey*, 141 N. Y. 179; *Hawn v. Stoler*, 208 Pa. St. 610, 65 L. R. A. 813; or by having the debtor make a note payable to the donee. *Thornton, Gifts*, 264, § 298; *Jones v. Deyer*, 16 Ala. 221; *Carver v. Carver*, 53 Ind. 241; *Towle v. Towle*, 114 Mass. 167; *Cerney v. Pawlot*, 66 Wis. 262; *Gosling v. Gosling*, 3 Drew. 335.

A gift can be made of corporate stock; *Thornton, Gifts*, 346, § 342; *Denunzio v. Scholtz*, 25 Ky. Law Rep. 1294; *Bond v. Bean*, 72 N. H. 444; though not indorsed; *Walsh v. Sexton*, 55 Barb. 251; *First B'k v. Holland*, 99 Va. 495, 86 Am. St. 898, 55 L. R. A. 155; nor as-

consideration⁵ is void⁶ and hence nothing is delivered.⁷

5. Thornton, Gifts, 267, § 300; Gammon Sem. v. Robbins, 128 Ind. 85; Smith v. Smith, 30 N. J. Eq. 564.

At common law a gift could be made by the donor of his own note by adding a seal to his signature, as the seal imported a consideration. Lamprey v. Lamprey, 29 Minn. 151; Stoy v. Stoy, 41 N. J. Eq. 370; Anthony v. Harrison, 14 Hun, 198, aff'd 74 N. Y. 613; Ross's App. 127 Pa. St. 4; Travis v. Travis, 8 Ont. 516, 12 Ont. App. 438.

Sometimes it happens that, although a note or check of the donor may be without consideration at the time it is given, a consideration subsequently arises. School Dist. v. Stocking, 138 Mo. 672, 60 Am. St. 576, 37 L. R. A. 406; Rolls v. Pearce, 5 Ch. D. 730, 46 L. J. Ch. 791, 36 L. T. Rep. N. S. 438, 25 Wkly. Rep. 399. Thus where a donor gave his note to a college, and in reliance thereon money was expended and liability incurred in erecting buildings, the note became a contract. Est. of Beatty v. Western Col., 177 Ill. 280, 69 Am. St. 242, 42 L. R. A. 797.

6. Raymond v. Sellick, 10 Conn. 480; Hall v. Howard's Adm'rs Rice (18 S. Car. Law) 310, 33 Am. Dec. 115.

7. School Dist. v. Stocking, 138 Mo. 672, 60 Am. St. 576, 37 L. R. A. 406. The very fact that the donee, after the death of the donor, would be compelled to submit his claim against the estate of the donor and have it allowed before his note could be available, determines that it is not a gift; as a gift would be in the possession of the donee and would not require probate. Holly v. Adams, 16 Vt. 206, 42 Am. Dec. 508.

signed; Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, aff'd 170 U. S. 36, 42 L. ed. 939; O'Donnell v. Gaffney, 22 Pa. Super. 316; or though not transferred on the books of the corporation. Bone v. Holmes, 195 Mass. 495; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313, 4 Gray, Cas. on Prop. 106.

The fact that the corporate by-laws require a transfer to be made by the stockholder or his attorney, does not defeat the gift, that provision relating to the legal title only, and a gift being sufficient if the equitable title alone passes. Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663.

Some cases hold that a gift of a certificate of stock is not complete without a transfer; Matthews v. Hoaglund (N. J.), 21 Atl. 1054; Moore v. Moore, L. R. 18 Eq. 474, 43 L. J. Ch. 617, 30 L. T. Rep. N. S. 752, 22 Wkly. Rep. 729; as the gift was not intended of the certificate, but of the stock; and the donee does not obtain possession of the stock until transferred on the books of the corporation which is the only place where a transfer can be made. Pennington v. Gittings, 3 Gill & J. 203, 4 Gray, Cas. on Prop. 96.

A bill of exchange or a draft payable to the donor⁸ may be the subject of gift; but a draft by the donor upon a third person cannot be,⁹ unless accepted by the drawee before the death of the donor;¹⁰ nor can a gift be made of the donor's own uncertified check¹¹ unless paid¹² before the death of the donor.

Delivery of a savings-bank pass-book¹³ is a good gift of the fund on deposit as evidenced by the pass-book;

8. Thornton, Gifts, 243, § 275; *Edwards v. Wagner*, 121 Cal. 376; *Rankin v. Weguclin*, 27 Beav. 309.

9. *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577.

10. Thornton, Gifts, 244, § 275; *Harris v. Clark*, 2 Barb. 94, aff'd 3 N. Y. 93, 51 Am. Dec. 352. Acceptance shifts the primary liability from the donor.

11. Thornton, Gifts, 301, § 319; *Pullen v. Placer B'k*, 138 Cal. 169, 94 Am. St. 19; *Thresher v. Dyer*, 69 Conn. 404; *McKenzie v. Downing*, 25 Ga. 669; *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. 278; *Gerry v. Howe*, 130 Mass. 350; *Walter v. Ford*, 74 Mo. 195; *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577; *Waynesburg Col. App.*, 111 Pa. St. 130, 56 Am. Rep. 252; *Tate v. Hilbert*, 2 Ves. Jr. 111, 4 Bro. Ch. 286. *Contra*: *Phinney v. State*, 36 Wash. 236, 68 L. R. A. 119.

A gift can be made of the donor's uncertified check which, in fact, covers the entire deposit, though such fact does not appear on its face; as an assignment results therefrom. *Varley v. Sims*, 100 Minn. 331, 117 Am. St. 694, 8 L. R. A. N. S. 828.

12. Thornton, Gifts, 293, § 315; *Suc. of De Pouilly*, 78 La. (22 La. Ann.) 97; *Pickslay v. Starr*, 149 N. Y. 432, 52 Am. St. 740, 32 L. R. A. 703; *Bouts v. Ellis*, 17 Beav. 121, aff'd 4 De G., M. & G. 249, 17 Jur. 585. Death would revoke the authority of the bank to pay the check. *Second B'k v. Williams*, 13 Mich. 282; *Simmons v. Cin. Soc.*, 31 Ohio St. 457, 27 Am. Rep. 521, aff'g 6 Am. L. Rec. 441.

13. Thornton, Gifts, 317, § 330; *Brown v. Brown*, 18 Conn. 410; *Curtis v. Portland B'k*, 77 Me. 151, 52 Am. Rep. 750; *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680; *Callanan v. Clement*, 42 N. Y. Supp. 514, aff'd 162 N. Y. 618; *Tillinghast v. Wheaton*, 8 R. I. 536, 94 Am. Dec. 126, 5 Am. Rep. 621. *Contra*: *Walsh's App.* (1888) 122 Pa. St. 177, 3 Am. St. 83. See, also, *Murray v. Cannon*, 41 Md. 466.

The donee acquires an equitable title to the fund. *Camp's App.* 36 Conn. 88, 4 Am. Rep. 39; *Pierce v. Boston B'k*, 129 Mass. 425, 37 Am. Rep. 371. Delivery of the pass-book without assignment is sufficient even though the rules of the bank require a written order of the depositor for the transfer. *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231. If the donee had purchased the book without any formal assign-

but delivery of a pass-book where the donor has a commercial or checking account is not a sufficient delivery of the fund in the bank.¹⁴ The rules of a savings-bank require the pass-book to be presented each time the depositor desires to draw money,¹⁵ hence the holder of the pass-book is in control of the fund;¹⁶ but in the case of a checking-account, possession of the pass-book does not give any control over the fund,¹⁷ the bank recognizing the check of the depositor without presentation of the

ment in writing he could have enforced payment, and if the title could pass by purchase, it would pass equally well by gift. *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. 758, 11 L. R. A. 684.

14. *Walsh's App.* 122 Pa. St. 177, 9 Am. St. 83, 1 L. R. A. 535; *Bouts v. Ellis*, 4 De G. M. & G. 249, 21 Eng. L. & Eq. 337, 17 Jur. 585.

In *Page v. Lewis*, 89 Va. 1, 37 Am. St. 848, 31 Am. Law Reg. 662, 18 L. R. A. 170, a gift of a bank-book was held to be a gift of the deposit. The book had been written up or balanced by the bank, and showed a balance due. It was the bank's acknowledgment of indebtedness to the depositor and the only voucher or evidence which he had upon which the law implies a promise to pay; and it was transferable by delivery without writing as any other chose in action. It passed the equitable title, and that is sufficient. The beneficial owner of any chose in action may sue upon it in his own name under the Va. Code, 1887, § 2860. There is a difference between a savings-bank pass-book and an ordinary bank-book, in that by a special method and agreement, on mere presentation of the savings-bank pass-book the bank will pay; but this is a mere special mode of dealing agreed on by the parties.

15. *Pierce v. Boston B'k*, 129 Mass. 425, 37 Am. Rep. 371, 4 Gray, Cas. on Prop. 112; *Polley v. Hicks*, 58 Ohio St. 218, 41 L. R. A. 858.

16. *Camp's App.*, 36 Conn. 88, 4 Am. Rep. 39; *Curtis v. Portland B'k*, 77 Me. 151, 52 Am. Rep. 750; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Dennin v. Hilton*, (N. J. Ch. 1901) 50 Atl. 600; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. 758, 11 L. R. A. 684; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *Goodrich v. Rutland B'k*, (Vt. 1908) 17 L. R. A. N. S. 651; *Brown v. Toronto Corp.*, 32 Ont. 319; *Re Weston*, [1902] 1 Ch. D. 680, 71 L. J. Ch. 343, 86 L. T. Rep. N. S. 551, 50 Wkly. Rep. 294. See, also, *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173. *Contra*: *Walsh's App.* 122 Pa. St. 177, 9 Am. St. 83, 1 L. R. A. 535.

17. *Ashbrook v. Ryon*, 65 Ky. 228, 92 Am. Dec. 481; *Van Fleet v. McCarn*, 2 N. Y. Supp. 675; *Thomas v. Lewis*, 89 Va. 1, 37 Am. St. 848, 18 L. R. A. 170.

pass-book,¹⁸ which is merely a receipt for the deposits made.

§ 225. **Gifts—Intention.** In making a gift, delivery alone is insufficient without an intention¹ to give. If a person intends to make a will but it fails from lack of proper execution, his act cannot be construed into a gift although delivery of the subject-matter is made to the intended legatee,² as the intention to make a gift is lacking.

The donee³ has the burden of showing everything essential to the validity of the gift;⁴ and the evidence

18. *Jones v. Weakley*, 99 Ala. 441, 42 Am. St. 84, 19 L. R. A. 700.

1. *Thornton, Gifts*, 61, § 70; *Beals v. Crowley*, 59 Cal. 665; *Trubey v. Pease*, 146 Ill. App. 507; *McKenna v. Kelso*, 52 Iowa, 727; *Lyons v. Lawrence*, 118 La. 461; *Brown v. Crafts*, 98 Me. 40; *Harris Co. v. Miller*, 190 Mo. 640, 1 L. R. A. N. S. 90; *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. 531, 6 L. R. A. 403; *Liebe v. Battmann*, 33 Oreg. 241, 72 Am. St. 705; *Reese v. Philadelphia Co.*, 218 Pa. St. 150, 120 Am. St. 880; *Martin v. Jennings*, 52 S. Car. 371; *Sheegog v. Perkins*, 51 Tenn. (4 Baxt.) 273; *Crook v. First B'k*, 33 Wis. 31, 35 Am. St. 17, *Van Zile, Illus. Cas. in Personalty*, 104. Where the donor expressed a desire to reward an old family servant with a gift of \$500, but indorsed certificates of stock valued at \$4,500; the donee could retain but \$500. *Crippen v. Adams*, 132 Mich. 31.

2. *Thornton, Gifts*, 38, § 40; *Rood. Wills*, 9, § 19; *McGrath v. Reynolds*, 116 Mass. 566, 4 Gray, Cas. on Prop. 566; *Earle v. Botsford*, 23 N. Brunsw. 407; *Mitchell v. Smith*, 33 L. J. Ch. 596, 10 L. T. Rep. N. S. 801, 4 De G. J. & S. 422, 12 Wkly. Rep. 941, 69 Eng. Ch. 422.

To establish a gift *causa mortis* there must be an intention that the property is to pass at once. Directions to enable one to draw a will will not constitute such a gift. *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587.

3. The Latin maxim is: *Nemo donare facile presumitur* (No one is presumed to give readily). Possession by the donee before the death of the donor, where the donee had access to the papers of the donor, is not even *prima facie* evidence. *Conklin v. Conklin*, 20 Hun (27 N. Y. Supr.) 278.

4. *Thornton, Gifts*, 189, § 216; *Edwards v. Jones*, 7 Sim. 325, *aff'd* 1 Myl. & C. 226.

must be clear⁶ and satisfactory.⁶ However, one⁷ witness, if credible, even though that witness be the claimant,⁸ is sufficient to establish a gift.

§ 226. **Gifts—Equity Will Not Aid Defects.** If, for any reason,¹ a gift is not completed, a court of equity will not interpose to perfect it;² that is, if a person intends gratuitously to transfer the ownership of property to another in a certain manner which he fails to accomplish, his act will not be construed to be something else although if he had intended to do what actually did occur, the ownership would have passed.³

5. Thornton, Gifts, 65, § 75; Dunbar v. Dunbar, 80 Me. 152, 6 Am. St. 166; Bellis v. Lyons, 97 Mich. 398, Van Zile, Illus. Cas. in Personalty, 113; Taylor v. Coriel, (N. J. Ch. 1904) 57 Atl. 810; Grey v. Grey, 47 N. Y. 552; Royston v. McCulley, (Tenn. Ch. 1900) 52 L. R. A. 899; Green v. Carlill, 4 Ch. D. 882, 46 L. J. Ch. 477.

6. Barnum v. Reed, 136 Ill. 388; Devlin v. Greenswick B'k, 125 N. Y. 756; Shirley v. Whitehead, 36 N. Car. 130; Cummings v. Meaks, 2 Pittsb. 490, 11 Pittsb. Leg. J. 291.

If a transaction points equally to a gift or to a loan, it will be regarded as a loan. Slaughter v. Tutt, 29 Va. (12 Leigh) 147; Dunne v. Boyd, 8 Ir. Eq. 609. Thus a remittance of money followed by a letter stating that the addressee could have it as long as he wanted it, will be presumed not to have been intended as a gift. Richardson's Est. 13 Phila. 241.

7. Page v. Lewis, 89 Va. 1, 37 Am. St. 949, 31 Am. Law Reg. 662, 18 L. R. A. 170.

8. Thornton, Gifts, 195, § 221; Bates v. Kempton, 73 Mass. 382; Kenistons v. Sceva, 54 N. H. 24; Walsh v. Studdart, 4 Dr. & War. 159, 6 Irish Eq. 161.

1. As non-delivery. Pullen v. Placer B'k, 138 Cal. 169, 94 Am. St. 19; Wadd v. Hazelton, 137 N. Y. 215, 33 Am. St. 707, 21 L. R. A. 693.

2. Thornton, Gifts, 413, § 410; McCartney v. Ridgway, 160 Ill. 129, 32 L. R. A. 555; Hatton v. Jones, 78 Ind. 466; Baltimore Co. v. Mall, 65 Md. 93, 57 Am. Rep. 307; Welsh v. Henshaw, 170 Mass. 409, 64 Am. St. 309.

3. If a person makes an attempt to create a trust by giving property to another which, for some reason, is unsuccessful, the transaction will not be construed as a declaration of trust by the owner. Thornton, Gifts, 412, § 409; Milroy v. Lord, 7 L. T. Rep. N. S. 178, 4 De G., F. & J. 264.

§ 227. **Gifts—Fraud—Undue Influence—Misrepresentation—Mistake—Duress—Illegality.** A gift, to be valid,⁴ must be free from fraud, from undue influence,⁵ from misrepresentation,⁶ from mistake,⁷ from duress, and from illegality. A gift will be regarded by a court with suspicion⁸ if the donor and donee occupy a confidential relationship, such as that of attorney and client,⁹ or if the donee was the spiritual adviser,¹⁰ of the donor, or if the parties were under engagement of marriage.¹¹ Gifts by a ward to his guardian¹² or by a child to his

4. Thornton, Gifts, 441, § 440; *Petty v. Webb*, 45 Ky. 468; *Gibson v. Hammang*, 63 Nebr. 349; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Sears v. Shafer*, 1 Barb. 408, aff'd 6 N. Y. 268; *Harris v. Delamar*, 38 N. Car. 219; *Osthaus v. McAndrew*, 5 Pa. Cas. 344; *Trusts Co. v. Hart*, 2 Ont. Law Rep. 251.

5. Thornton, Gifts, 93, § 113; *Gilmore v. Lee*, 237 Ill. 402; *Millican v. Millican*, 24 Tex. 426. Undue influence consists in destroying the freedom of the will of the donor, thus making his act rather the will and act of another person. *Decker v. Waterman*, 67 Barb. 460.

6. *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Re Glubb*, [1900] 1 Ch. 354, 69 L. T. Rep. N. S. 412.

7. Thornton, Gifts, 95, § 118; *Re Hemphill's Est.*, 179 Pa. St. 87; *Marshall v. Russell*, 98 Tenn. 261.

8. Thornton, Gifts, 450, § 455. The existence of a confidential relation between the parties raises a presumption against the validity of the gift; *Gilmore v. Lee*, 237 Ill. 204, 41 Chl. Leg. N. 217; *Huguenin v. Basely*, 14 Ves. 273; throwing on the donee the burden of showing that the act of the donor was free and spontaneous.

9. Thornton, Gifts, 453, § 457; *Walsh v. Studdart*, 6 Irish Eq. 161, 2 C. & L. 423, 4 Sug. Dec. 159.

10. Thornton, Gifts, 456, § 458; *Gilmore v. Lee*, 237 Ill. 402, 41 Chl. Leg. News, 217; *Thompson v. Heffernan*, 4 Sug. Dec. 285.

11. Thornton, Gifts, 458, § 460; *Rockafellow v. Newcomb*, 57 Ill. 186; *Tarbell v. Tarbell*, 92 Mass. 278; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Fay v. Rickman*, 45 N. Car. 278; *Kline's Est.* 64 Pa. St. 122; *Woodward v. Woodward*, 37 Tenn. 49; *Page v. Horne*, 11 Beav. 227.

12. Thornton, Gifts, 450, § 466; *Ashton v. Thompson*, 32 Minn. 25; *Meek v. Perry*, 36 Miss. 190; *Garvin v. Williams*, 44 Mo. 465; *Gale v. Wells*, 12 Barb. 84; *Greenfield's Est.* 14 Pa. St. 489; *Hylton v. Hylton*, 2 Ves. Sr. 547.

parent¹³ are looked upon with suspicion; though it is otherwise if the gift is from a parent to his child.¹⁴

§ 228. **Gifts—Classification.** Gifts may be classified as absolute and conditional or contingent;¹ and the conditions or contingencies may be either express or implied. A very common² classification of gifts is into *donationes inter vivos* (gifts between living persons) and *donationes mortis causa* (gifts in prospect of death); but this classification is inaccurate for the reason that all gifts must necessarily be between living persons.³ A gift *inter vivos*, as used in such a classification, is one that is made without expectation of death as the moving cause.⁴ A gift *causa mortis*, is always conditional and contingent; but there are other conditional⁵ and contingent⁶ gifts than gifts *causa mortis*. Thus, the donor may annex an express condition subsequent to his gift that the donee is to deliver a part of the subject-matter to a third person;⁷ that the income from the gift shall be paid to the donor;⁸ that the donee shall provide for the

13. Thornton, Gifts, 459, § 462; *Beith v. Beith*, 76 Iowa, 601; *Miskey's App.* 107 Pa. St. 611.

14. Thornton, Gifts, 459, § 461; *Tenbrook v. Brown*, 17 Ind. 410.

1. Nicholas v. Adams, 2 Whart. 17; *Seabright v. Seabright*, 28 W. Va. 412.

2. Thornton, Gifts, 1, § 1; *Taylor v. Harmison*, 79 Ill. App. 380, *aff'd* 179 Ill. 137; *Royston v. McCulley*, (Tenn. Ch. 1900) 52 L. R. A. 899.

3. *Walsh's App.* 122 Pa. St. 177, 9 Am. St. 83, 1 L. R. A. 535; *Gass v. Simpson*, 44 Tenn. 288, 294.

4. *Taylor v. Harmison*, 79 Ill. App. 380, *aff'd* 179 Ill. 137.

5. *O'Connor v. O'Connor*, 5 Ont. W. R. 10.

6. Thornton, Gifts, 77, § 93; *M'Kane v. Bonner*, 1 Bailey, 113; *Blanchard v. Sheldon*, 43 Vt. 512.

7. Thornton, Gifts, 77, § 94; *Gilchrist v. Stevenson*, 9 Barb. 9; *Swihart v. Shaum*, 24 Ohio St. 432; *Lines v. Lines*, 142 Pa. St. 149, 24 Am. St. 487; *Scot v. Haughton*, 2 Vern. Ch. 560, 23 Eng. Reprint, 963.

8. *Condee v. Connecticut B'k*, (Conn. 1908) 71 Atl. 551; *Bone v. Holmes*, 195 Mass. 495; *Doty v. Willson*, 47 N. Y. 580; *Goodrich v. Rutland B'k*, (Vt. 1908) 17 L. R. A. N. S. 651.

funeral expenses of the donor;* or a father may make a gift to his son upon condition that the latter shall keep sober and attend to business.¹⁰ A condition subsequent may be implied; thus where money is given by a man to a woman in expectation of marriage, for the purpose of purchasing her wardrobe and for traveling expenses, there is an implied condition that the donee shall carry out her agreement to marry.¹¹ If the gift is made on condition or subject to a contingency, non-performance of the condition or non-happening of the contingency entitles the donor to reclaim the subject-matter,¹² unless compensation can be made for the breach,¹³

§ 229. *Gifts Causa Mortis.* A gift *causa mortis*¹ is

If the condition annexed to a gift relates to the delivery thereof, the gift would be imperfect. *Shaw v. White*, 28 Ala. 637; *Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118; *Warren v. Durfee*, 126 Mass. 338; *Pierce v. Brown Univ.*, 21 R. I. 392; *Bennett v. Cook*, 28 S. Car. 353; *Hackett v. Moxley*, 65 Vt. 71; *Sterling v. Wilkinson*, 83 Va. 791; *Blount v. Burrow*, 1 Ves. Jr. 546, 30 Eng. Reprint, 481, 4 Bro. Ch. 72, 29 Eng. Reprint, 784. It is requisite to the validity of a gift that the donor relinquish all dominion over the subject-matter. A condition that the donor might reclaim the article at any time prior to his death would invalidate the gift. *Selleck v. Selleck*, 107 Ill. 389; *Rosenburg v. Rosenberg*, 21 N. Y. Supp. 336, 15 N. Y. Supp. 591.

9. *Curtis v. Portland B'k*, 77 Me. 151, 52 Am. Rep. 750.

10. *Berry v. Berry*, 31 Iowa, 415. After performance of the condition, this might become a contract, the consideration being the giving up of a legal right by the son.

11. *Thornton, Gifts*, 94, § 117; *Stauffer v. Morgan*, 90 La. (39 La. Ann.) 632; *Williamson v. Johnson*, 62 Vt. 378, 22 Am. St. 117, 9 L. R. A. 277; *Robinson v. Cummings*, 2 Atk. 409.

12. *Conkling v. Springfield*, 39 Ill. 98; *Berry v. Berry*, 31 Iowa, 415; *Eskridge v. Farrar*, 81 La. (30 La. Ann.) 718; *Halbert v. Halbert*, 21 Mo. 277; *Lyon v. Marclay*, 1 Watts, 271; *Williamson v. Johnson*, 62 Vt. 378, 22 Am. St. 117, 9 L. R. A. 277; *The Lucy Ann*, 3 Ware, 253; *Young v. Burrel Cary*, 77. *Contra*: *Gaunt v. Tucker*, 18 Ala. 27.

13. A gift of money to a college on condition that annuities are paid to the donor during life, is not forfeited by nonpayment of the annuities, the donor having only a right of action therefor. *Est. of Beatty v. Western Col.*, 177 Ill. 280, 69 Am. St. 242, 42 L. R. A. 797.

1. The law relating to *donationes mortis causa* is derived from the civil law. *Raymond v. Sellick*, 10 Conn. 480; *Ward v. Turner*, 2 P. P. 20

one made when the death of the donor in the near future from existing disease or impending peril is quite probable,² and made by him on that account. Gifts *causa mortis* are not favored³ by the law, as they are a fruitful source of bitter, protracted and expensive litigation. As there is a strong temptation to commit fraud and perjury to establish them⁴ they are scanned by the courts with circumspection⁵ and the evidence to sustain them must be very clear and full.⁶

A gift *causa mortis* resembles⁷ a bequest in that it is made in view of death and is revocable. It is distinguished⁸ therefrom because delivery is necessary, title passes immediately⁹ from the donor though defeasible, it

Ves. Sr. 431. The civil lawyers in turn borrowed this method of donation from the Greeks. 2 Blacks. Comm. 514.

2. Hatcher v. Buford, 60 Ark. 169, 27 L. R. A. 507, 508, Van Zile, Illus. Cas. in Personality, 119; Raymond v. Sellick, 10 Conn. 480; Taylor v. Harmison, 79 Ill. App. 380, aff'd 179 Ill. 137; Walsh's App. 122 Pa. St. 177, 9 Am. St. 83, 1 L. R. A. 535.

3. Raymond v. Sellick, 10 Conn. 480; Gilmore v. Lee, 237 Ill. 402; Champney v. Blanchard, 39 N. Y. 111.

4. Drew v. Hagerty, 81 Me. 231, 10 Am. St. 255, 3 L. R. A. 230, 4 Gray, Cas. on Prop. 119; Hall v. Howard's Adm'rs, Rice (18 S. Car. Law) 310, 33 Am. Dec. 115.

5. Haydock v. Haydock's Ex'rs, 34 N. J. Eq. 570, 38 Am. Rep. 385; Jones v. Selby, 2 Eq. Abr. 573, case 2, Gibb. Ch. 342, Finch, 300.

6. Leyson v. Davis, 17 Mont. 220, 31 L. R. A. 429, aff'd 170 U. S. 36, 42 L. ed. 939; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313, 4 Gray, Cas. on Prop. 106; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 22 Cent. Law J. 299; Royston v. McCulley, (Tenn. Ch. 1900) 52 L. R. A. 899.

7. Dawson v. Waggaman, (D. C.) 22 App. Cas. 428; Baker v. Smith, 66 N. H. 422; Prince v. Hazleton, 20 Johns. 502, 6 N. Y. Com. Law, 1095; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 22 Cent. Law J. 299; Nicholas v. Adams, 3 Whart. 17.

A gift *causa mortis* resembles a nuncupative will, as each may be oral. Robson v. Jones, 3 Del. Ch. 51.

8. Thornton, Gifts, 22, § 20; Drew v. Hagerty, 81 Me. 321, 10 Am. St. 255, 3 L. R. A. 230, 4 Gray, Cas. on Prop. 119; Seybold v. Grand B'k, 5 N. Dak. 460.

9. Gass v. Simpson, 44 Tenn. 288; and thus revokes a prior bequest of the subject-matter. Drury v. Smith, 1 P. Wms. 404, 24 Eng. Reprint, 446.

must be made when there is a prospect of death of the donor at a period not remote, it does not require probate and the personal representative is not entitled to its possession,¹⁰ and it is not subject to abatement upon deficiency of assets though it may be taken for debts if necessary.

It is one of the very essential elements of a gift *causa mortis* that it be made in contemplation of the death of the donor from present sickness or from immediate peril¹¹ (*in periculo mortis*); the general apprehension of death from the mortality of man will not suffice.¹² A groundless apprehension is sufficient.¹³ It is not requisite that the donor lack time or facilities for making a formal will¹⁴ or that he be on his death-bed, or even that

10. Thornton, Gifts, 45, § 47; 2 Blacks. Comm. 514; Hatcher v. Buford, 60 Ark. 169, 27 L. R. A. 507, Van Zille, Illus. Cas. in Personalty, 119; Raymond v. Sellick, 10 Conn. 480; Marshall v. Berry, 95 Mass. 43; Kiff v. Weaver, 94 N. Car. 274, 55 Am. Rep. 601; Holley v. Adams, 16 Vt. 206, 42 Am. Dec. 508. As it frequently is expressed in the cases, a *donatio mortis causa* is claimed against the executor; a legacy is claimed from him. Gaunt v. Tucker's Ex'rs, 18 Ala. 27; Borneman v. Sidlinger, 18 Me. 225; Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543.

11. Thornton, Gifts, 31, § 27; New Haven B'k v. Balcom, 35 Conn. 351; Sessions v. Moseley, 58 Mass. 87; Keye v. Westerhaus, 42 Mo. App. 49; Craig v. Kittredge, 46 N. H. 57; Crue v. Caldwell, 52 N. J. L. 215; Kiff v. Weaver, 94 N. Car. 274, 55 Am. Rep. 601; Flanders v. Blandy, 45 Ohio St. 108; Thompson v. Thompson, 12 Tex. 327; Darling v. Emery, 74 Vt. 167; Page v. Lewis, 89 Va. 1, 37 Am. St. 848, 31 Am. Law Reg. 662, 18 L. R. A. 170; Dickeschied v. Wheeling B'k, 28 W. Va. 340; Edwards v. Jones, 1 Myl. & C. 226, 5 L. J. Ch. 194, 13 Eng. Ch. 226, 40 Eng. Reprint, 361.

A gift made in contemplation of suicide is not one *causa mortis*, as the life of the donor is not in peril when it is made. Thornton, Gifts, 32, § 31; Earle v. Botsford, 23 N. Brunsw. 407.

12. Rood, Wills, 18, § 35; Zeller v. Jordan, 105 Cal. 143; Taylor v. Harmison, 79 Ill. App. 380, aff'd, 179 Ill. 137; Calvin v. Free, (Kans. 1903) 71 Pac. 823.

13. Thornton, Gifts, 31, § 27; Nicholas v. Adams, 2 Whart. 17.

14. Ridden v. Thrall, 125 N. Y. 572, 21 Am. St. 758; Nicholas v. Adams, 2 Whart. 17.

he be confined to the house;¹⁵ nor is there any limit to the time within which the donor must die after making the gift, though he must not recover nor must the peril cease.¹⁶ If a person in health, without any immediate peril threatening him, make a gift, it is not one *causa mortis* though he die shortly after.¹⁷ The fact that the donor is very old and realizes that he is nearing the end of life's journey is not alone sufficient to constitute a gift *causa mortis* if he does not have some disease,¹⁸ even though not in good health and dies shortly after;¹⁹ but if an aged person is in ill health which has been dangerous and prolonged and he is fast declining,²⁰ or is confined to his bed,²¹ that will be sufficient to justify a gift *causa mortis*. A serious surgical operation which the donor is about to undergo is a sufficient apprehension of death;²² but a soldier enlisting in time of war is not regarded as being in such peril as to justify a gift *causa mortis*, as he is not in immediate peril.²³

15. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Gass v. Simpson*, 44 Tenn. 283.

16. *Thornton, Gifts*, 35, § 34; *Rood, Wills*, 19, § 36; *Larrabee v. Hascall*, 88 Me. 511, 51 Am. St. 440.

17. *Walden's Adm'rs v. Dixon*, 21 Ky. 170.

18. *Taylor v. Harmison*, 79 Ill. App. 380, aff'd, 179 Ill. 137.

19. An old man who walked two miles, though not in good health, and took to his bed a month after making a gift, and died about a month after he took to his bed, is not "in peril of death," "*in extremis*," or "in his last sickness." *Robson v. Jones*, 3 Del. Ch. 51.

20. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, aff'd 170 U. S. 36, 42 L. ed. 939.

21. Where the donor was seventy-eight years old, was confined to his bed which he never leaves, and dies five months after making the gift, it was made with a view to his death. *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, 4 Gray, Cas. on Prop. 106.

22. *Varley v. Sims*, 100 Minn. 331, 117 Am. St. 694, 8 L. R. A. N. S. 828; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. 758, 11 L. R. A. 644.

23. *Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118; *Sheldon v. Button*, 5 Hun, 110; *Linsensbigler v. Gourley*, 56 Pa. St. 166, 94 Am. Dec. 51.

In *Virginia v. Gaither*, 42 Ill. 39, a contrary view is taken; the rule stated in the text is better, as it is not a sufficient ground for a gift

It does not follow, however, because a person is on his death bed, that a gift made by him is necessarily a gift *causa mortis*; a person about to die can make an absolute gift the same as he could under any other circumstances;²⁴ though a gift made during the last illness of the donor *prima facie* is presumed to be *causa mortis*.²⁵

causa mortis that, for some reason, the life of the donor is more likely to be shortened than those of some others. That a soldier does not expect to die is shown by the fact that in the Boer War in Africa so few of the soldiers used the blank forms of wills supplied to them by the British government. Statistics show that comparatively a small percentage of those enlisted die during a war, and the most of those from diseases which they might have had if they had remained at home. The dangers surrounding the human race in times of peace, from motor-cars and the like, are very great; but this would not be considered by any court as constituting a sufficient ground for making a gift *causa mortis*.

The case of *Gass v. Simpson*, 44 Tenn. 288, usually is cited as a contrary decision; but in that case the donor was obliged to leave home in consequence of a rigid and merciless Confederate conscription and in order to avoid giving compulsory service to a rebellion with which he was not in sympathy, and, being hunted by armed men, he resolved to join the Union army. This was regarded as a sufficient apprehension of peril to make his gift *causa mortis*; but the circumstances were quite different from an ordinary enlistment where a soldier sniffs the battle afar off.

24. Thornton, Gifts, 24, § 21; Rood, Wills, 19, § 36; *Newton v. Snyder*, 44 Ark. 42; *Gilligan v. Lord*, 51 Conn. 562; *Coffey v. Coffey*, 179 Ill. 283; *Wilson v. Jourdain*, 79 Miss. 133; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543.

25. Thornton, Gifts, 38, § 39; *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, Van Zille, Illus. Cas. in Personalty, 119; *Knight v. Tripp*, 121 Cal. 674; *Dresser v. Dresser*, 46 Me. 48; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Rhodes v. Childs*, 64 Pa. St. 18; *Sheegog v. Perkins*, 51 Tenn. (4 Baxt.) 273; *Seabright v. Seabright*, 28 W. Va. 412; *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. 757; *Gardner v. Parker*, 3 Madd. *184.

A sufficient recognition of the near approach of death is indicated if the gift is of money which the donor wants used during his last illness and to pay his funeral expenses, saying that the remainder is the donee's; *Dunbar v. Dunbar*, 80 Me. 152, 6 Am. St. 166; or if the articles given would be needed by the donor if he lived, as wearing apparel, his watch, the furniture in the rooms occupied by him, and his carriage and horses; *Delmotte v. Taylor*, 1 Redf. Surr. 417; or if the

Every gift *causa mortis* is subject to at least one condition and some contingencies. The condition is that it be not revoked by the donor.¹ This condition may be expressed though usually it is implied.² A gift would be revoked expressly by suing to recover it.³ It is not revoked, however, by a subsequent will⁴ of the donor disposing of all of his property, the will not operating until death;⁵ and as the title to the gift passed to the donee it ceased to be the property of the donor; but a will may indicate revocation if it expressly or by implication bestows the specific property previously made the subject of gift,⁶ or if the gift was of all of the property of the donor.⁷ A gift *causa mortis* may be revoked by the acts of the donor; as where he had assigned a pass-book to the donee, which of itself would have been sufficient to complete the gift, but on the day of his death, told the donee to hurry down to the bank, get the money and bring it to the donor. This was a revocation though the donor died before the donee returned, the act plainly indicating that the donor still claimed the money as his own and intended to take it into his possession.⁸

donor, unable to gain support, gives all of his property. *Jayne v. Murphy*, 31 Ill. App. 28.

1. Thornton, Gifts, 43, § 44; *Duncan v. Duncan*, 15 Ky. 12; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 22 Cent. Law J. 299; *Dickeschied v. Bank*, 28 W. Va. 340.

2. *Raymond v. Sellick*, 10 Conn. 480; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Crips v. Towsley*, 73 Mich. 395; *Gass v. Simpson*, 44 Tenn. 288; *Johnson v. Colley*, 101 Va. 414, 99 Am. St. 884; *Crook v. Baraboo B'k*, 83 Wis. 31, 35 Am. St. 17.

3. *Adams v. Atherton*, 132 Cal. 164; *Bates v. Kempton*, 73 Mass. 382.

4. *Nicholas v. Adams*, 2 Whart. 17.

5. Thornton, Gifts, 43, § 45; *Rood, Wills*, 21, § 39; *Brunson v. Henry*, 140 Ind. 455; *Hoehn v. Struttman*, 71 Mo. App. 399; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543.

6. *Merchant v. Merchant*, 2 Bradf. Surr. 443, 7 Redf. Surr. 432.

7. *Jayne v. Murphy*, 31 Ill. App. 28.

8. *Doran v. Doran*, 99 Cal. 311, *Van Zile*, Illus. Cas. in *Personalty*, 125.

A gift *causa mortis* likewise is revoked impliedly by the donor recovering possession of the subject-matter and treating it as his own;⁹ or where he subsequently gives the same article to another person.¹⁰ One contingency annexed to a gift *causa mortis*, which may be expressed but likewise usually is implied, is that if the donor recover from his illness or survive the apprehended peril, the gift is revoked.¹¹ The gift having been made in expectation of death in the near future, it fails if death does not ensue as expected.¹² It is not necessary that the donor should die of the particular disease with which he is afflicted at the time of making the gift, or from the apprehended peril which threatened him; but it is sufficient if at the time of his death he had not recovered from such disease or survived the peril which he had in mind.¹³

9. *Merchant v. Merchant*, 2 Bradf. Surr. 443, 7 Redf. Surr. 432.

10. *Thornton, Gifts*, 98, § 123; *Parker v. Marston*, 27 Me. 196; *Wells v. Tucker*, 3 Binn. 366; *Bunn v. Markham*, Holt, 352, 2 Marsh. 532, 7 Taunt. 224, 17 Rev. Rep. 497, 3 Eng. Com. Law, 143.

11. *Thornton, Gifts*, 1, § 1; 2 Blacks. Comm. 514; *Raymond v. Sellick*, 10 Conn. 480; *Robson v. Jones*, 3 Del. Ch. 51; *Roberts v. Draper*, 18 Ill. App. 167; *Lisle v. Tribble*, 92 Ky. 304, 13 Ky. Law. Rep. 595; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Peck v. Scofield*, 186 Mass. 108; *Varley v. Sims*, 100 Minn. 331, 117 Am. St. 694, 8 L. R. A. N. S. 828; *Emery v. Clough*, 63 N. H. 552, 56 Am. Rep. 543; *Kiff v. Weaver*, 94 N. Car. 274; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 22 Cent. Law J. 299; *Rhodes v. Childs*, 64 Pa. St. 18; *Gass v. Simpson*, 44 Tenn. 288; *Thompson v. Thompson*, 12 Tex. 327; *Page v. Lewis*, 89 Va. 1, 37 Am. St. 848, 31 Am. Law Reg. 662, 18 L. R. A. 170; *Cook v. Baraboo B'k*, 33 Wis. 31, 35 Am. St. 17.

If the donor recovers, the gift is voidable, not void; and, generally, the donor is the only one who can avoid it. Hence if the subject-matter was a note indorsed to the donee, and the donor has not reclaimed it, the indorsee can sue on the note. *Hulley v. Chedic*, 22 Nev. 127, 53 Am. St. 729.

Where a consumptive gave a note when he expected to live but a little while, but he got better and attended to business for some months, the gift is revoked though he was taken sick again and died. *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250.

12. *Staniland v. Willott*, 3 Macn. & G. 664, 49 Eng. Ch. 512.

13. *Larrabee v. Haskall*, 33 Me. 511, 51 Am. St. 440.

Another contingency which may be expressed but usually is implied in a gift *causa mortis* is that the donee shall survive the donor;¹⁴ for if the donee predecease the donor the gift is avoided.¹⁵ A gift *causa mortis* is subject also to the contingency that it may be taken to pay the claims of creditors of the donor if his estate is not sufficient to pay such claims in full.¹⁶

The death of the donor does not have any other effect upon the title to the gift than to make it absolute¹⁷ by putting it out of his power to revoke it¹⁸ and making

Where a donor, about to undergo a severe surgical operation from which he feared he might not recover, survived the operation but died of heart disease, the gift was upheld. *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. 758, 11 L. R. A. 684. When it is said, in some of the cases, that the donor must die from the apprehended disease, it means that he must not recover therefrom. He may have several diseases, and, in making the gift, apprehend death from one and not from the others, but the gift should not be invalid because he does not die from the one he feared but from another. It might be difficult or impossible to tell what share any disease had in causing death.

14. *Thornton, Gifts*, 42, § 43; *Smith v. Ferguson*, 90 Ind. 229; *Huntington v. Gilmore*, 14 Barb. 243; *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. 757; *Jones v. Selby*, Finch, 300.

15. *Gourley v. Linsenbigler*, 51 Pa. St. 345.

16. *Rood, Wills*, 22, § 42; 2 Blacks. Comm., 514; *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, Van Zile, Illus. Cas. in Personalty, 119; *Virgin v. Gaither*, 42 Ill. 39; *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626; *Harris v. Clark*, 2 Barb. 94, 96, aff'd 3 N. Y. 93; *Seybold v. Grand B'k*, 5 N. Dak. 460; *Nicholas v. Adams*, 2 Whart. 17; *Gass v. Simpson*, 44 Tenn. 288, 297.

17. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, aff'd, 170 U. S. 36, 42 L. ed. 939; *Doty v. Willson*, 47 N. Y. 580.

It sometimes is inaccurately stated that a gift *causa mortis* is executory, not vesting until the death of the donor. *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, Van Zile, Illus. Cas. in Personalty, 119; *Barnes v. People*, 25 Ill. App. 136; *Huntington v. Gilmore*, 14 Barb. 243; *Edwards v. Jones*, 1 Myl. & C. 226. That this is not so is shown by the fact that the donee would not be under obligation to make compensation for the immediate use of the subject-matter of the gift, the ownership being in him; and by the fact that it is not revoked by a subsequent will. *Nicholas v. Adams*, 2 Whart. 17.

18. *Thornton, Gifts*, 45, § 46; *Daniel v. Smith*, 64 Cal. 346; *Devol v. Dye*, 123 Ind. 321; *Marshall v. Berry*, 95 Mass. 43; *Trolicht v.*

it impossible for two of the contingencies to arise,¹⁹ namely, recovery of the donor and predecease of the donee. The remaining contingency of insolvency of the estate of the donor, would remain until the estate finally is settled.

§ 230. **Gifts Irrevocable.** An absolute gift once executed, cannot be retracted²⁰ any more than an absolute sale can be rescinded by the seller.

§ 231. **Advancements.** There is a species of gift somewhat resembling a gift *causa mortis*, known as an advancement. An Advancement is a gift by a person in his lifetime, who afterwards dies intestate, to one apparently of his next of kin, on account of the share of the estate of the donor which the donee would receive under the statute of distribution. Although advancements are not confined to gifts from a parent to his children, they most frequently occur in that relation.¹

Welzenecker, 1 Mo. App. 482; Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543.

19. Nicholas v. Adams, 2 Whart. 17.

20. Thornton, Gifts, 86, § 105; 2 Blacks. Comm. 441; Easley v. Dye, 14 Ala. 158; Ryburn v. Pryor, 14 Ark. 505; Fanning v. Green, (Cal. 1909) 104 Pac. 308; Kerrigan v. Rautigan, 43 Conn. 17; Watts v. Starr, 86 Ga. 392; Welsch v. Belleville B'k, 94 Ill. 191; Garner v. Graves, 54 Ind. 188; Gault v. Trumbo, 56 Ky. 682; McCloskey v. McCloskey, 80 La. (29 La. Ann.) 237; Barker v. Frye, 75 Me. 29; Gardner v. Merritt, 32 Md. 78; Stone v. Hackett, 78 Mass. (12 Gray), 227; James v. Allen, 68 N. J. Eq. 666, 111 Am. St. 654, 2 L. R. A. N. S. 285; Gray v. Barton, 55 N. Y. 68, 14 Am. Rep. 181; App. of Fasset, 167 Pa. St. 448, Van Zile, Illus. Cas. in Personalty, 116; Esswein v. Seigling, 2 Hill Eq. 600; Trowell v. Carraway, 57 Tenn. (10 Heisk.) 104; Mayo v. Carrington, 60 Va. (19 Gratt.) 74; Kellogg v. Adams, 51 Wis. 138, 37 Am. Rep. 815, Pattee, Illus. Cas. in Personalty, 195; Lafleur v. Girard, 2 Low. Can. Jur. 90; Smith v. Smith, 7 C. & P. 401.

1. The motive of a parent in making an advancement is probably to start a grown-up child in business so that it can provide for itself; and in some cases it may be that the parent wishes to see the ability of his children to manage small capital before larger sums are intrusted to them; or to remove from their minds a possible idea that participation in his property can result from his death alone, thus

There is a similarity between an advancement, a gift *causa mortis* and a bequest, in that the donor, having his ultimate dissolution in mind, makes an entire or partial distribution of his estate, becoming, as it were, his own personal representative; but an advancement differs from a gift *causa mortis* because the donor may be without apprehension of death from existing sickness or peril at the time he acts; and differs from a bequest because in an advancement the title passes at once and not at his decease. An advancement differs from ademption chiefly because ademption is connected with a will.² Thus where a testator, after making a will directing a legacy to be paid to one of his children, afterwards gives such child a sum of money intending it to be in lieu of the legacy, it is called "ademption," not an advancement.³ An advancement is to be distinguished from "satisfaction," as in the latter there is a legal obligation, on the part of the person giving the property, to the person to whom it is given, the object of the transaction being cancellation of such obligation; and consent of both parties may be necessary.⁴

§ 232. **Declaration of Trust.** Usually in making a gift the donor divests himself of both the legal and the equitable title, each of which passes to the donee; though it is sufficient if the equitable title alone passes to the donee, the legal title being transferred to a third person who holds in trust for the donee, the latter being the *cestui que trust*. There is another form of gift, known

causing them, as future distributees of his estate, to look forward to his death as financial gain to them. For these or for other reasons, the parent gives in his lifetime a portion or all of the distributive share of his estate which a child might receive at the death of the parent.

2. Thornton, Gifts, 513, § 528; Marshall v. Rensch, 3 Del. Ch. 239; Newell's Will, 1 Browne, 311; Allen v. Allen, 13 S. Car. 512.

3. Clendinning v. Clymer, 17 Ind. 155; Langdon v. Astor, 16 N. Y. 1.

4. Thornton, Gifts, 514, § 529; Wallace v. Du Bois, 65 Md. 153; *Chichester v. Coventry*, L. R. 2 H. L. 71.

as a Declaration of Trust,⁵ in which the equitable⁶ title alone passes from the donor, he retaining the legal title instead of transferring it to a third person, and the donor himself becoming a trustee⁷ for the donee.

The requisites for a valid declaration of trust are quite similar to those for a gift. Delivery, which is so important in a gift of the legal title, is not required in a declaration of trust,⁸ the retention of the subject-matter not only not interfering with the validity of the trust,⁹ but, on the contrary, such retention is proper because the trustee, having the legal title, should be in possession.¹⁰ In place of delivery it is essential that the donor should make a declaration;¹¹ but no particular form of words is necessary,¹² a written instrument is not required,¹³ and notice to the *cestui que trust* is unnecessary.¹⁴

5. A Declaration of Trust is the act by which a person acknowledges that he holds the title to property for the use of another.

A declaration of trust by a deposit in a bank as trustee for another, is valid. Thornton, Gifts, 331, § 338; Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Bath Inst. v. Hathorn, 88 Me. 122, 51 Am. St. 382; Blasdel v. Locke, 52 N. H. 238; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447, 15 Am. Law. Reg. 701. See, also, Vandenberg v. Palmer, 4 Kay & J. 204. *Contræ*: Pope v. Burlington B'k, 56 Vt. 284, 48 Am. Rep. 781.

6. Millspaugh v. Putnam, 16 Abb. Pr. 380. A gift of an undorsed negotiable instrument is really a declaration in trust.

7. Abegg v. Hirst, (Iowa, 1909) 122 N. W. 838; Bath Inst. v. Hathorn, 88 Me. 122, 51 Am. St. 382.

8. Blake v. Jones, 1 Bailey Eq. 141, 21 Am. Dec. 530.

9. Willis v. Smyth, 91 N. Y. 297.

10. Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Ray v. Simmons, 11 R. I. 266, 15 Am. Law Reg. 701.

11. Bath Inst. v. Fogg, 101 Me. 188.

12. Wadd v. Hazelton, 137 N. Y. 215, 33 Am. St. 707, 21 L. R. A. 692.

13. Thornton, Gifts, 412, § 412; Minor v. Rogers, 40 Conn. 512; Bath Inst. v. Hathorn, 88 Me. 122, 51 Am. St. 382; Harris Co. v. Miller 190 Mo. 640, 1 L. R. A. N. S. 790; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Flanders v. Blandy, 45 Ohio St. 108; Ray v. Simmons, 11 R. I. 266, 15 Am. Law Reg. 701; Ellison v. Ellison, 6 Ves. Jr. 656.

14. Thornton, Gifts, 426, § 426; Abegg v. Hirst, (Iowa, 1909) 122 N. W. 838; Butler's Case, 3 Coke K. B. 26 b. See, however, Matter of Totten, 179 N. Y. 112.

§ 233. **Wills.** A Will is a disposition of property to take effect at death. The person making the will is known as the "testator."¹ If the property disposed of by will is realty, the testator is called a deviser and is said to devise the property, which itself is called a devise; the person to whom real property is given is called a devisee. If the property given is personalty the testator is said to bequeath it; and the property given is designated as a bequest, or a legacy if money, and the recipient is called a legatee. A will written entirely in the handwriting of the testator is known as a "holograph" or "olograph."² An oral will is called a "nuncupation."³ A Codicil is an addition to a prior will, explaining, adding to, subtracting from, or otherwise changing it, the prior will and subsequent codicils together being in the nature of a new will.

The law relating to wills is comparatively modern and purely statutory; and as the right of an owner of property to designate those who shall possess it after his death, is a mere privilege, it is very essential that the statutory formalities be complied with. Generally, a will must be signed⁴ and attested.⁵ In construing a will, the intention of the testator, if clear, will govern the courts although he may have not used correct legal terms.

Bequests are general, demonstrative or specific. A General Bequest is one of quantity, the subject-matter

1. The feminine form is *testatrix*, plural *testatrices*. A person dying and leaving a will is testate; if without a will, he is intestate. Rood, Wills, 24, § 45.

2. Rood, Wills, 25, § 48. Hol-o-graph is accented on the first syllable, o having the short sound as in *on*. It is from two Greek words meaning *whole* and *to write*.

3. Nun-cu-pa-tion is accented on the third syllable; the first *n* is short as in *nun*, *c* as *k*, *a* long as in *pay*. The adjective is *nun-cu-pa-tion*, accented on the second (or first) syllable, the second *n* long as in *cute*, *t* short as in *tin*.

4. Rood, Wills, 161, § 253.

5. That is, bear the signatures of witnesses. Rood, Wills, 171, § 263.

not in any way separated or distinguished from other property of the same kind;⁶ as a sum of money, even though given for a special purpose,⁷ or it is all⁸ or the residue⁹ of the property of the testator, or all of a certain kind¹⁰ of property; as all of the stocks owned by the testator at the time of his death.¹¹ A Specific Bequest is one of particular property designated, identified and distinguished from all other of the same kind. A specific bequest vests in the legatee as of the time of the death of the testator, unless the will shows otherwise. The courts are averse to construing legacies as specific unless the intention of the testator is clear.¹² A Demonstrative Bequest is one in which the particular property from which it is to be made, and of which it is to be a part only, is pointed out; being in its nature between a general and a specific bequest. Thus a legacy of a sum of money out of a debt due the testator, would be demonstrative;¹³ though a bequest of the entire debt due would be specific.¹⁴ If the fund fails from which a

6. See *Gilmer v. Gilmer*, 42 Ala. 9. A bequest of a quantity of corn or of a number of sheep would be general; *Jeffreys v. Jeffreys*, 3 Atk. 121; and in most cases delivery to the legatee of any corn or of any sheep, would be sufficient.

7. *Moore v. Moore*, 50 N. J. Eq. 554; *Matter of Hodgman*, 69 Hun, 484, aff'd 140 N. Y. 421; *Apreece v. Apreece*, 1 Ves. & B. 364.

8. *Kelly v. Richardson*, 100 Ala. 584; *Re Ovey*, 20 Ch. D. 676.

9. *Bradford v. Haynes*, 20 Me. 105; *England v. Prince George's Parish*, 53 Md. 466; *First Parish v. Cole*, 20 Mass. 232.

10. *Jenkins v. Hanahan*, Cheves Eq. 129.

11. *Parrott v. Worsfold*, 1 Jac. & W. 575, 21 Rev. Rep. 248.

12. *Harper v. Bibb*, 47 Ala. 547; *Morton v. Murrell*, 68 Ga. 141; *Bradford v. Haynes*, 20 Me. 105; *Kunkel v. Macgill*, 56 Md. 120; *Wilcox v. Wilcox*, 95 Mass. 256; *Vaiden v. Hawkins*, 59 Miss. 406; *Wallace v. Wallace*, 23 N. H. 149; *Tift v. Porter*, 8 N. Y. 516; *Warren v. Wigfall*, 3 Desauss. Eq. 47; *Kennedy v. Sinnott*, 179 U. S. 606; *Ellis v. Walker*, AmbL. 309.

13. *Vickers v. Pound*, 6 H. L. Cas. 885, 6 Wkly. Rep. 580, 4 Jur. N. S. 543.

14. *Jervis v. Ferris*, 28 Pa. Co. 142.

demonstrative legacy is to be made, it is treated as a general legacy.¹⁵

A Residuary Bequest is one of all of the personal estate not otherwise effectually disposed of by other bequests. A Lapsed Bequest is one, originally valid, which fails through some contingency or the non-performance of a condition. The most common cause of a bequest lapsing is the death of the legatee before the death of the testator.

Ademption is the prevention of a legacy taking effect as such by some occurrence affecting the subject-matter in the lifetime of the testator. It may result from destruction of the subject-matter, from a change in its identity, or from a disposition of it by the testator.

Abatement is the reduction of legacies in amount, owing to the assets of an estate being insufficient to pay them all in full. It sometimes happens that a testator has overestimated his property, or that it has been reduced by business reverses occurring between the time the will was made and the time it becomes effective by his death. The first to feel a deficiency in assets would be the residuary legatee; as until debts and all other legacies are paid, there is no residue.¹⁶ If there is no residue and not enough to pay general legacies in full, the general legacies are reduced proportionately. Specific legacies do not abate at all unless there is not enough left for debts after the property intended for the general legacies has been exhausted.¹⁷ A demonstrative legacy does not abate with the general legacies unless, from a failure of the fund upon which it is charged, it is treated as a general legacy.¹⁸ Ademption resulting from

15. *Maybury v. Grady*, 67 Ala. 147; *Gelbach v. Shively*, 67 Md. 498; *Merriam v. Merriam*, (Minn. 1900) 83 N. W. 162; *Crawford v. McCarthy*, 159 N. Y. 519; *Armstrong's App.* 63 Pa. St. 312; *Morris v. Garland*, 78 Va. 215; *Willcox v. Rhodes*, 2 Russ. 452.

16. *Rood, Wills*, 496, § 742.

17. *Rood, Wills*, 497, § 744.

18. *Rood, Wills*, 498, § 745.

a gift of the subject-matter to the legatee is called Satisfaction. As text-books¹⁹ devoted entirely to wills, are available to the student, the subject will not be pursued further here.

§ 234. Involuntary Transfers. An Involuntary or Compulsory Transfer of property results from the action of one party only to accomplish it, the other generally not only not acquiescing therein but frequently offering opposition thereto.²⁰ The most important involuntary transfers of property arise under execution and judicial sales, bankruptcy, and the exercise of sovereign power.

§ 235. Execution Sales—Judgment—The Writ. The most common instance of involuntary transfer of property is a sale on execution or under a judicial decree. If A. has a claim against X. which the latter neglects or refuses to pay, A., in a civil action, applies to a court having jurisdiction, states his case in appropriate pleadings, and if his proof is satisfactory obtains a judgment or a decree against X.¹ The next step is to enforce its collection. Execution is the act or mode of carrying into effect the judgment or decree of a court.² It likewise

19. See Rood on the Law of Wills, by John R. Rood.

20. It frequently is difficult, in making an arbitrary classification of any kind, to decide under what head to place certain topics, as they seem not to belong entirely in one division. Thus a judgment may be obtained against a person, followed by a levy and an execution sale, and the proceeding not only may not be against the wishes of the debtor but at his earnest request and with his aid. This clearly is not an involuntary transfer; yet as such instances are uncommon as compared with proceedings which are opposed by the debtor, and as the subject when considered must be considered as a whole, it naturally is placed under the head of involuntary transfers. Likewise some of the cases denominated as being by operation of law might become a voluntary or involuntary transfer by act of one or of both of the parties. A death-bed marriage made solely to accomplish a transfer of property from the party dying to the survivor would be an illustration of this.

1. 3 Blacks. Comm. 377.

2. Kinney, Law Dict., 298; 3 Blacks. Comm. 412.

is the name given to the writ authorizing an officer to proceed to enforce a judgment or decree.³ A writ of execution is obtained by application⁴ to the clerk of the court or other officer vested by law with the authority and duty of issuing it.

An execution cannot be taken out in one state upon a judgment recovered in another state; but a second suit, based upon such foreign judgment, must be brought in the state where an execution is desired, the foreign judgment being *prima facie* evidence for the plaintiff, though it may be impeached for fraud or for lack of jurisdiction⁵ of the court in which it was rendered. The Federal Constitution provides that full faith and credit shall be given in each state to the records and judicial proceedings of every other state,⁶ which are proved by the attestation of the clerk and the seal of the court annexed, together with a certificate of the presiding magistrate that the attestation is in due form.⁷

§ 236. Execution Sales—The Levy—How Made. A writ of execution having been obtained, the next step is to place it in the hands of the proper officer for service.⁸ It authorizes the officer to proceed to do something by which it is hoped a sum of money may be produced⁹ to satisfy the judgment previously obtained. If the writ direct the seizure of the goods of the person against whom the judgment was rendered, it is called a writ of

3. Freeman, Executions (3d ed.) 2, § 1.

4. The legal fee therefor must be paid; 1 Freeman, Executions (3d ed.) 27, § 9b.

5. Bimelar v. Dawson, 5 Ill. 536.

6. Const. U. S., Art. IV, § 1.

7. U. S. Rev. St. § 905; Willock v. Willson, 178 Mass. 68; Kinseley v. Rumbough, 96 N. Car. 193; Fitzsimmons v. Johnson, 90 Tenn. 416; Ritchie v. Carpenter, 2 Wash. 512; Keith v. Stiles, 92 Wis. 15, Re Rooney, 20 Fed. Cas. No. 12,032.

8. 1 Freeman, Executions (3d ed.) 353, § 98.

9. 1 Freeman, Executions (3d ed.) 6, § 2.

feri facias.¹⁰ The writ of *feri facias* is a common law writ directed to the sheriff of the county by his official title, commanding him that, of the goods and chattels of the defendant to be found in his bailiwick,¹¹ he levy and cause to be made the sum of money mentioned in the writ and to have the same before the court on the return day of the writ.¹²

A levy is the taking or seizure of property under execution;¹³ and must be made by a competent, disinterested¹⁴ officer,¹⁵ who cannot act outside of his district.¹⁶ The officer usually serving such writs is the sheriff¹⁷ if the judgment has been rendered by a county court; a writ issued by a United States Court is served by the United States Marshal; writs issued from minor courts are served by a constable, bailiff, or other officer authorized. The officer usually is required to indorse upon the

10. 1 Freeman, Executions (3d ed.) 13, § 7. It receives its name from the words contained in the writ when legal proceedings were conducted in Latin—*quod fieri facias de bonis et catallis* (that you cause to be made of the goods and chattels). 3 Blacks. Comm. 417. Frequently, for brevity, it is called a "*f. fa.*"

11. In his county.

12. Rorer, Jud. Sales (2d ed.) 439, § 1200.

13. Kinney, Law Dict. 428.

14. 2 Freeman, Executions (3d ed.) 1678, § 291; Rorer, Jud. Sales (2d ed.) 466, § 1274; Chambers v. Thomas, 10 Ky. 536; Bower v. Jones, 35 N. Car. 25, 55 Am. Dec. 426; May v. Walters, 2 McCord, 470; Riner v. Stacy, 27 Tenn. 288.

15. A writ may be executed by any deputy of an authorized officer. Rorer, Jud. Sales (2d ed.) 466, § 1274; Tillotson v. Cheetham, 2 Johns. 63.

16. 2 Freeman, Executions (3d ed.) 1396, § 250b; Oldfield v. Eulert, 148 Ill. 614, 39 Am. St. 231; Needles v. Frost, 2 Okla. 19.

17. The writ is served by the coroner if the sheriff is incapacitated; 1 Blacks. Comm. 349; Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414; Chambers v. Thomas, 11 Ky. 268; Singletary v. Carter, 1 Bailey Law, 467; or if there is a vacancy in that office. 1 Freeman, Executions (3d ed.) 355, § 29a.

writ the precise time when it came into his hands.¹⁸ Upon receiving the writ, the officer should proceed¹⁹ to make a levy upon property sufficient²⁰ to satisfy the execution.²¹ If, after the exercise of ordinary diligence in an endeavor to ascertain whether the debtor has any property, the officer remains in ignorance of the existence of any such property, he is not liable for not making a levy.²²

Under the common law principle that every man's house is his castle, the officer does not have authority to force an outer door²³ but if he gains entry without force, he forcibly may enter any inner room or break open trunks, chests, wardrobes if necessary.²⁴ The privilege which extends to a person's habitation does not extend to stores or barns not connected with his dwelling-house nor within the curtilage;²⁵ nor does the rule against breaking an outer door extend to the dwelling-house of

18. 1 Freeman, Executions (3d ed.) 353, § 98; Williams v. Lowndes, 1 Hall (1 N. Y. Super.) 578; Knox v. Webster, 18 Wis. 406, 86 Am. Dec. 779.

19. State v. Porter (Del.), 1 Harr. 126; Com. v. Gill, 53 Ky. 20.

20. 2 Freeman, Executions (3d ed.) 1408, § 253; Alexander v. State, 42 Ark. 41; French v. Snyder, 30 Ill. 339, 83 Am. Dec. 193; Ransom v. Halcott, 18 Barb. 56; Hall v. Tomlinson, 5 Vt. 228; Dewitt v. Oppenheimer, 51 Tex. 108.

21. 2 Freeman, Executions (3d ed.) 1399, § 252.

22. 2 Freeman, Executions (3d ed.) 1402, § 252; Lucier v. Pierce, 60 N. H. 13.

23. 2 Freeman, Executions (3d ed.) 1438, § 256; Rorer, Jud. Sales (2d ed.), 458, § 1248; 3 Blacks. Comm. 417. Even though the door is not locked. 2 Freeman, Executions (3d ed.), 1441, § 256; Welsh v. Wilson, 34 Minn. 92; State v. Armfield, 9 N. Car. 246. A levy made under such circumstances is void. Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459.

24. 2 Freeman, Executions (3d ed.), 1437, § 256; Prettyman v. Dean (Del.), 2 Harr. 494.

25. McGee v. Given, 4 Blackf. 18; Platt v. Brown, 33 Mass. 553; Stearns v. Vincent, 50 Mich. 209, 45 Am. Rep. 37; Haggerty v. Wilber, 16 Johns. 288, 8 Am. Dec. 321; Mesner v. Lewis, 20 Tex. 221; Penton v. Brown, 1 Sid. 186.

another than the debtor,²⁶ provided a demand to open the door has been made and refused.²⁷

To make a levy, the officer must take possession²⁸ of the property; but after an officer has levied upon property, the mere receipt of subsequent executions operates as a constructive levy on such property without any further act,²⁹ each being entitled in its order to participate in any surplus.³⁰

If the first levy is not on sufficient property to satisfy the debt, the officer must make such further seizures at a subsequent period as may be necessary for that purpose.³¹ On the other hand, an officer is liable if he make

26. 2 Freeman, Executions (3d ed.), 1442, § 256.

27. Keith v. Johnson, 31 Ky. 605, 25 Am. Dec. 167; De Graffenreid v. Mitchell, 3 McCord Law, 506, 15 Am. Dec. 648; Douglass v. State, 14 Tenn. 525; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

28. Leach v. Pine, 41 Ill. 66; Levy v. Shockley, 29 Ga. 710; Scott v. Niblett, 57 La. (6 La. Ann.) 182; Banks v. Evans, 18 Miss. 35; Westervelt v. Pinckney, 14 Wend. 123; Brown v. Lane, 19 Tex. 203. A mere "paper" levy is void; Rorer, Jud. Sales (2d ed.), 456, § 1243; Crisfield v. Neal, 36 Kans. 278; Carey v. Bright, 58 Pa. St. 70; that is, a levy cannot be made by an indorsement upon the writ without going near the property which it is desired to seize. State v. Poor, 20 N. Car. 384, 34 Am. Dec. 387.

29. 2 Freeman, Executions (3d ed.) 1496, § 267; Leach v. Pine, 41 Ill. 65, 89 Am. Dec. 375; Brown v. Loesch, 3 Ind. App. 145; Turner v. Austin, 16 Mass. 181; Cahn v. Person, 56 Miss. 360; State v. Doan, 39 Mo. 44; Cresson v. Stout, 17 Johns. 116, 8 Am. Dec. 373; Penland v. Leatherwood, 101 N. Car. 509, 9 Am. St. 38; Watmough v. Francis, 7 Pa. St. 206; Meacham Co. v. Strong, 3 Wash. Terr. 61; Wintle v. Freeman, 11 A. & E. 539, 1 G. & D. 93. See, however, Bank of Santa Fe v. Haskell B'k, 59 Kans. 354.

30. 2 Freeman, Executions (3d ed.), 1006, § 196; Rorer, Jud. Sales (2d ed.), 466, § 1273; Hanauer v. Casey, 26 Ark. 352; Speelman v. Chaffee, 5 Colo. 247; Love v. Williams, 4 Fla. 126; Everingham v. National B'k, 124 Ill. 527; Marshall v. McLean, 3 Greene, 363; Kennon v. Ficklin, 45 Ky. 415; Peck v. Tiffany, 2 N. Y. 451; Gillespie v. Keating, 180 Pa. St. 150, 57 Am. St. 622; Faircloth v. Ferrell, 63 N. Car. 640; Furman v. Christie, 3 Rich. 1; Garner v. Cutler, 28 Tex. 175; Drewe v. Lainson, 11 A. & E. 537.

31. 2 Freeman, Executions (3d ed.), 1407, § 253; Summerhill v. Trapp, 48 Ala. 363; Webb v. Camp, 26 Ga. 54; Everingham v. Na-

an excessive levy,²² though such levy is not void.²³

§ 237. **Execution Sales—Property Subject to Levy.** In the absence of a statute on the point, real and personal property are equally liable to execution;¹ but in most states statutes provide which kind of property must be sought first.² Generally all tangible property is subject to levy.³

Money may be taken in execution⁴ provided it is specific money belonging to the judgment debtor;⁵ but a levy cannot be made upon a deposit of money, as in a bank, where the depositor is not entitled to the specific coins or bills delivered by him but only to an amount equal to the amount deposited, the money becoming the

tional B'k, 124 Ill. 527; *Ind. C. R. W. Co. v. Bradley*, 15 Ind. 23; *Dodge v. Doane*, 57 Mass. 460; *Hombs v. Corbin*, 20 Mo. App. 497; *Moses v. Thomas*, 26 N. J. L. 124; *Denvre v. Fox*, 22 Barb. 522; *Pugh v. Calloway*, 10 Ohio St. 488; *Bank of Tenn. v. Turney*, 26 Tenn. 271; *Starr v. Moore*, 3 McLean, 354.

22. 2 Freeman, Executions (3d ed.), 1410, § 253; *Jones v. Davis*, 2 Ala. 730; *State B'k v. Martin* (Kans.), 28 Pac. 200; *Vance v. Vandersdale*, 64 Ky. 504; *Silver v. McNeill*, 52 Mo. 518; *Atcheson v. Hutchison*, 51 Tex. 223; *McConnell v. Kaufman*, 5 Wash. 686; *Ventris v. Brown*, 22 Up. Can. C. P. 345; *Wordye v. Bally*, Noy. 39.

23. 2 Freeman, Executions (3d ed.), 1412, § 253; *Black v. Nettles*, 25 Ark. 606; *Brown v. Cougot*, 47 La. (8 Rob.) 14; *Backus v. Barber*, 107 Mich. 468; *Green v. Burke*, 23 Wend. 490; *Pugh v. Calloway*, 10 Ohio St. 488; *Brown v. Allen*, 40 Tenn. 429; *McConnell v. Kaufman*, 5 Wash. 686.

1. 1 Freeman, Executions (3d ed.), 410, § 109; *Dowdell v. Neal*, 10 Ga. 148.

2. 1 Freeman, Executions (3d ed.) 409, § 109.

3. 1 Freeman, Executions (3d ed.), 417, § 110; *Handy v. Dobbie*, 12 Johns. 220.

4. *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Brooks v. Thompson*, 1 Root, 216; *State v. Taylor*, 56 Mo. 495; *Spencer v. Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412; *Crane v. Freese*, 16 N. J. L. 307; *Taylor's App.* 1 Pa. St. 390; *Means v. Vance*, 1 Bailey, 39; *Dolby v. Mullins*, 22 Tenn. 437, 39 Am. Dec. 180; *Russell v. Lawton*, 14 Wis. 202, 80 Am. Dec. 769; *Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631; *Turner v. Fendall*, 1 Cranch, 134; *King v. Webb*, 2 Show. 166. See, also, *Exchange B'k v. Stewart* (Ala.), 48 So. 487.

5. 1 Freeman, Executions (3d ed.), 427, § 111.

property of the person to whom it is delivered and the relationship of debtor and creditor being established. In such a case the depositor has ceased to have money, acquiring, in its place, a credit,⁶ which can be reached by attachment⁷ only. Money rightfully levied upon is applied on the writ by the officer.⁸

At common law, incorporeal property⁹ could not be seized and sold on execution; but by statute in most states such property can be reached.¹⁰ Equitable¹¹ in-

6. *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Moorman v. Quick*, 20 Ind. 67; *Scott v. Smith*, 2 Kans. 428; *Carroll v. Cone*, 40 Barb. 220.

7. *Jones v. Jones*, 1 Bland, 443, 18 Am. Dec. 327.

8. *Hamilton v. Ward*, 4 Tex. 356.

9. 1 *Freeman, Executions* (3d ed.), 417 § 110; *Rorer, Jud. Sales* (2d ed.), 447, § 1220; *McGehee v. Cherry*, 6 Ga. 550; *McClelland v. Hubbard*, 2 Blackf. 361; *Osborn v. Cloud*, 23 Iowa, 104; *Taylor v. Gillean*, 23 Tex. 508. A levy cannot be made upon a judgment. 1 *Freeman, Executions* (3d ed.), 432, § 112; *Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. 48; *Wilson v. Matheson*, 17 Fla. 630; *contra: Safford v. Maxwell*, 74 La. (23 La. Ann.) 345. A levy cannot be made on a promissory note; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; a draft: *McCann v. Randall*, 147 Mass. 81, 9 Am. St. 666; book-accounts; *Brisco v. Askey*, 12 Ind. 666; *Rosenthal v. Muskegon Judge*, 98 Mich. 208, 39 Am. St. 535; *Clark v. Warren*, 7 Lans. 180; *Brower v. Smith*, 17 Wis. 410; corporate stock; 1 *Freeman, Executions* (3d ed.), 435, § 112a; *Rorer, Jud. Sales* (2d ed.), 451, § 1230; *Nabring v. Bank of Mobile*, 58 Ala. 204; *Stamford Bank v. Ferris*, 17 Conn. 259; *Rhea v. Powell*, 24 Ill. App. 77; *Williamson v. Smoot*, 7 La. (7 Mart.) 31, 12 Am. Dec. 494; *Van Norman v. Jackson County*, 48 Mich. 204; *Foster v. Potter*, 37 Mo. 525; *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Cooper v. Canal Co.*, 6 N. Car. 195; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373; a patent right; *Walker, Patents* (4th ed.), 144, § 156; *Peterson v. Sheriff of San Francisco*, 115 Cal. 211; *Stevens v. Gladding*, 58 U. S. 447; an interest held adversely; 1 *Freeman, Executions* (3d ed.), 431, § 112; *Horton v. Smith*, 8 Ala. 73, 42 Am. Dec. 628; *Com. v. Abell*, 29 Ky. 476; or a remainder, though vested. *Goode v. Longmire*, 35 Ala. 668, 76 Am. Dec. 309.

10. 1 *Freeman, Executions* (3d ed.), 428, § 112; *Union B'k v. Byram*, 131 Ill. 92.

11. 1 *Freeman, Executions* (3d ed.), 474, § 116; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *Badlam v. Tucker*, 18 Mass. 399, 11 Am. Dec. 202; *Van Norman v. Jackson Ct.*, 45 Mich. 204; *Roads v. Symmes*,

terests also cannot be seized and sold, and can be reached in a court of equity¹² only, unless the common law rule has been changed by statute.¹³

The interest of one who has hired personal property for a term is subject to seizure and sale under execution, the purchaser at the execution-sale acquiring the right to retain and use the property to the end of the term¹⁴ unless the terms of the hiring preclude a transfer.¹⁵ Property in the possession of a bailee can be seized on

1 Ohio, 281, 13 Am. Dec. 621; *Shute v. Harder*, 9 Tenn. 3, 24 Am. Dec. 427. The interest of one who has assigned his property for the benefit of creditors, is not subject to execution, the assignee having the legal title. *Pope v. Boyd*, 22 Ark. 535; *Wilkes v. Ferris*, 5 Johns. 345, 4 Am. Dec. 364; *Sprinkle v. Martin*, 66 N. Car. 55; *Williamson v. Clark*, Miles, 153; *Metcalf v. Scholey*, 2 B. & P. N. R. 461.

12. *Pacific B'k v. Robinson*, 57 Cal. 520; *Pendleton v. Perkins*, 49 Mo. 565; *Tarbell v. Griggs*, 3 Paige, 207, 23 Am. Dec. 790; *Petition of Keach*, 14 R. I. 571; *Rice ads. Burnett*, 1 Spears Eq. 579, 42 Am. Dec. 336; *Bigelow v. Congregational Soc.*, 11 Vt. 283; *Ager v. Murray*, 105 U. S. 126.

Equitable interests cannot be reached in a court of equity, even by virtue of a statute making equitable interests subject to execution, if such interest arises through what commonly is called a "spendthrift trust" recognized as valid in some states, that is, a trust created by one person in favor of another with an express provision against the property in the hands of the trustee being reached by the creditors of the *cestui que trust*. *Seymour v. McAvoy*, 121 Cal. 438; *Fearson v. Dunlop*, 21 D. C. 236; *Wagner v. Wagner*, 244 Ill. 101; *Martin v. Davis*, 82 Ind. 38; *Murphy v. Delano*, 95 Me. 233; *Claffin v. Claffin*, 149 Mass. 19, 14 Am. St. 393; *Leigh v. Harrison*, 69 Miss. 933; *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. 368; *Fisher v. Taylor*, 2 Rawle, 33; *Gamble v. Dabney*, 20 Tex. 69; *Barnes v. Dow*, 59 Vt. 530.

13. 1 Freeman, Executions (3d ed.), 475, § 116.

14. 1 Freeman, Executions (3d ed.), 494, § 119; *Van Antwerp v. Newman*, 2 Cow. 543, 15 Am. Dec. 340; *Allen v. Urqhart*, 19 Tex. 487; *Ward v. Macauley*, 4 T. R. 489.

15. As a bailment of a wagon to be used only "for the baker business" with a provision that it should not be sold or loaned. As the interest of the bailee could not be transferred voluntarily, it cannot be transferred involuntarily. *Reinmiller v. Skidmore*, 7 Lans. 161. A sale on execution transfers what the debtor himself might transfer. *Griffith v. Fowler*, 18 Vt. 290, *Lawson, Cas. Pers. Prop.* 510,

execution against the bailor¹⁶ unless the bailee has a beneficiary interest in the bailed article with a right to retain possession for a specified time, in which case the property cannot be seized.¹⁷ Unless by virtue of statutory provisions pledged property cannot be taken under execution¹⁸ without first paying or assuring the pledgee to the amount of his debt.¹⁹

Under the modern theory prevailing in many states that, prior to default, the mortgagor remains the owner of the chattels, the mortgagee being regarded as having a lien merely, the interest of the mortgagor is subject to execution;²⁰ but after a breach of condition,²¹ or if the mortgagee is in possession,²² a levy cannot be

16. *Thomas v. Thomas*, 9 Ky. 430; *Beale v. Digges*, 47 Va. (6 Gratt.) 582.

17. 1 Freeman, *Executions* (3d ed.), 501, § 121; *Hartford v. Jackson*, 11 N. H. 145.

18. *Rorer*, *Jud. Sales* (2d ed.), 447, § 1220; *Johnson v. Crawford*, 6 Blackf. 377.

19. 1 Freeman, *Executions* (3d ed.), 497, § 120; *Badlam v. Tucker*, 18 Mass. 389, 11 Am. Dec. 202; *Stief v. Hart*, 1 N. Y. 28; *Waller v. Hanger*, 3 Bulstr. 17.

In Pennsylvania the officer may sell though he cannot seize pledged goods. *Baugh v. Kirkpatrick*, 54 Pa. St. 84, 93 Am. Dec. 675.

20. 1 Freeman, *Executions* (3d ed.), 477, § 117; *O'Neal v. Wilson*, 21 Ala. 288; *Moore v. Murdock*, 26 Cal. 527; *Hobart v. Frisbie*, 5 Conn. 592; *Martin v. Duncan*, 156 Ill. 274; *Schrader v. Wolfen*, 21 Ind. 238; *Myers v. Cole*, 32 Kans. 138; *Fugate v. Clarkson*, 41 Ky. 41, 36 Am. Dec. 589; *Ford v. Philpot*, 5 Harr. & J. 312; *Hunter v. Hunter*, Walk. 194; *Gould v. Armagost*, 46 Nebr. 897; *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56; *Curd v. Wunder*, 5 Ohio St. 92; *Garro v. Thompson*, 7 Watts, 416; *Goode v. Rogers*, 19 R. I. 1; *McKnight v. Gordon*, 13 Rich. Eq. 222, 94 Am. Dec. 164; *Rayson v. Reed*, 55 Tex. 266; *Collins v. Gibson*, 5 Vt. 243; *Saxton v. Williams*, 15 Wis. 292.

21. 1 Freeman, *Executions* (3d ed.) 484, § 117; *Heflin v. Slay*, 78 Ala. 180; *Simmons v. Jenkins*, 76 Ill. 479; *State v. Milligan*, 106 Ind. 109; *Coleman v. Reel*, 70 Iowa, 27; *Ament v. Greer*, 37 Kans. 648; *Butler v. Lee*, 54 Miss. 476; *Blawelt v. Fechtman*, 48 N. J. L. 430; *Baltes v. Ripp*, 42 N. Y. 210, 1 Abb. Dec. 78; *Arnold v. Chapman*, 13 R. I. 586.

22. 1 Freeman, *Executions* (3d ed.), 478, § 117; *Mattison v. Baucus*, 1 N. Y. 295, 4 How. Pr. 367, How. App. Cas. 639; *Ashley v. Wright*, 19 Ohio St. 291; *Cotton v. Watkins*, 6 Wis. 629.

made. Under the old common law the interest of a mortgagor in mortgaged property, was not subject to levy,²³ because he had transferred the legal title, leaving nothing which could be sold under execution,²⁴ even though he might have an interest which he could assign.²⁵ His interest was only an equitable²⁶ one which the common law did not recognize.²⁷ Whenever mortgaged property is seized, the levy is made subject to the mortgage.²⁸ Statutes have been enacted in many states²⁹ enabling

In Indiana the officer can seize the property while in the possession of the mortgagee; 1 Freeman, Executions (3d ed.), 483, § 117; provided there has not been a foreclosure. *Landers v. George*, 49 Ind. 309, Griffin, Illus. Cas. on Pers. Prop. 198. In some state a levy and sale may be made without taking the property from the possession of the mortgagee. *Fox v. Cronan*, 47 N. J. L. 498; *Welch v. Bell*, 32 Pa. St. 12; *Chicago Co. v. Fisher*, 18 Nebr. 334.

23. Neither was the interest of a mortgagor subject to attachment at common law. 2 Cobbey, Chat. Mort. 914, § 718.

24. 2 Cobbey, Chat. Mort. 392, § 682; *Jennings v. McIlroy*, 42 Ark. 236, 48 Am. Rep. 61.

25. 2 Cobbey, Chat. Mort. 920, § 723.

26. 1 Cobbey, Chat. Mort. 604, § 456; 1 Freeman, Executions (3d ed.), 476, § 117; *Metsler v. James*, 12 Colo. 322; *Dyer v. Cady*, 20 Conn. 563; *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230; *Badlam v. Tucker*, 18 Mass. 389, 11 Am. Dec. 202; *Young v. Schofield*, 132 Mo. 650; *Metcalf v. Scholey*, 2 B. & P. N. R. 461.

If the mortgagee is rightfully in possession of the property, the interest of the mortgagor (*Becker v. Dunham*, 27 Minn. 32; *Blue B'k v. Clement*, 20 Nebr. 294), or the surplus if any (*Chicago Co. v. Fisher*, 18 Nebr. 334; *Marsh v. Wade*, 1 Wash. 538), can be reached by garnishment.

27. 2 Cobbey, Chat. Mort. 914, § 718.

28. 2 Cobbey, Chat. Mort. 921, § 723; *Rorer, Jud. Sales* (2d ed.), 451, § 1229; *Gaar v. Hurd*, 92 Ill. 315; *Schrader v. Woelfin*, 21 Ind. 238; *Forbes v. Parker*, 33 Mass. 462, Griffin, Illus. Cas. on Pers. Prop. 184; *Wilson v. Montague*, 57 Mich. 638; *Porter v. Parmley*, 43 How. Pr. 445, 34 N. Y. Super. 398, 52 N. Y. 185; *Cotton v. Marsh*, 6 Wis. 221.

29. 1 Freeman, Executions (3d ed.), 484, § 117. Such statutes must be followed strictly. 2 Cobbey, Chat. Mort. 914, § 718; *Barrows v. Turner*, 50 Me. 127; *Sherman v. Davis*, 137 Mass. 132; *Marsh v. Lawrence*, 4 Cow. 461. Some statutes, provide for possession being

mortgaged property to be seized. Generally, the interest of the mortgagee before foreclosure, is not subject to execution,³⁰ even though the property is in his possession after a breach of condition, the reason being that, although technically the legal title is in him, his interest is for security only, being more in the nature of a pledge; and as the mortgage, if given to secure the payment of money, is but an incident of the debt and passes with it, if the debt were paid by the mortgagor prior to foreclosure, any title acquired through a levy of a creditor of the mortgagee would be defeated.

§ 238. Execution Sales—The Levy—Co-Ownership. If judgment be obtained against several persons jointly, a levy can be made on property owned by them as co-tenants,¹ or the writ may be satisfied entirely out of the property of any one of them.² Where a judgment is ob-

taken by the officer. *Sparks v. Compton*, 70 Ind. 393; *Wing v. Bishop*, 75 Mass. 223; *Rosenfield v. Case*, 87 Mich. 295. Many statutes require a satisfaction of the claim of the mortgagee before the property can be sold. *Frisbee v. Langworthy*, 11 Wis. 375.

30. 1 Freeman, Executions (3d ed.), 491, § 118; *Morris v. Baker*, 82 Ala. 2; *Trapnall v. State B'k*, 18 Ark. 53; *Huntington v. Smith*, 4 Conn. 235; *Cooch v. Gerry* (Del.), 3 Harr. 280; *Nicholson v. Walker*, 4 Ill. App. 404; *Scott v. Mewhuter*, 49 Iowa, 487; *Buck v. Sanders*, 31 Ky. 187; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Murphy v. Galloupe*, 143 Mass. 123; *Class v. Ellison*, 9 N. H. 69; *Chapman v. Hunt*, 18 N. J. Eq. 370; *Jackson v. Willard*, 4 Johns. 42; *Knowles v. Herbert*, 11 Oreg. 54, 240; *Rickert v. Madeira*, 1 Rawle, 325; *Voorhies v. Hennessy*, 7 Wash. 243.

1. 1 Freeman, Executions (3d ed.), 522, § 125.

2. 2 Freeman, Executions (3d ed.), 1426, § 254a; *Gregg v. Crawford*, 4 Ala. 180, 37 Am. Dec. 739; *Steele v. Atlanta Co.*, 91 Ga. 64; *Starry v. Johnson*, 32 Ind. 440; *Fuller v. Loring*, 42 Me. 481; *Parker v. Dennie*, 23 Mass. 277; *Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Eason v. Petway*, 18 N. Car. 44; *Burdick v. Burdick*, 16 R. I. 495; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Warren v. Edgerton*, 22 Vt. 199, 54 Am. Dec. 66; *Knight v. Charter*, 22 W. Va. 422; *Hyde v. Rogers*, 59 Wis. 154.

In a few states, if one is principal and the others are his sureties, the sureties can require a levy first to be made upon the property

tained against one person owning property in common with others, the levy should be made upon the interest only of such person, in the property, and not upon the entire property,³ although the officer, unless forbidden by statute,⁴ may take exclusive possession of the chattel and retain and deliver it to the purchaser.⁵ However, only the interest of the debtor, and not the entire property,⁶ passes to the purchaser, who becomes a tenant in common with the other owner.⁷ It may work a hardship upon the other co-tenant, not liable for the debt, to have the common property taken from his possession by the officer,⁸ but this is one of the disagreeable burdens of co-ownership.⁹ It would not be just to creditors if a person,

of the principal; 2 Freeman, Executions (3d ed.), 1447, § 259; Hyman v. Seaman, 33 Miss. 185; Atkinson v. Rhea, 26 Tenn. 59; Kelso v. Pratt, 26 Tex. 381; provided the surety point out such property. Gibson v. Hughes, 7 Miss. 315.

3. Neary v. Cahill, 20 Ill. 214.

4. 1 Freeman, Executions (3d ed.), 525, § 125. In a few states a levy can be made upon an undivided interest without taking possession. 2 Freeman, Executions (3d ed.) 1427, § 254a; Vicory v. Strausbaugh, 78 Ky. 425; Blumenfeld v. Denard, 71 Miss. 342.

5. 1 Freeman, Executions (3d ed.), 524, § 125; Freeman, Co-tenancy, § 214; Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; White v. Jones, 38 Ill. 159; Kilby v. Haggin, 26 Ky. 215; Thomas v. Turvey, 1 Harr. & G. 435; Hayden v. Binney, 73 Mass. 416; Caldwell v. Auger, 4 Minn. 217, 77 Am. Dec. 515; Lawrence v. Burnham, 4 Nebr. 361, 97 Am. Dec. 540; Phillips v. Cook, 24 Wend. 389; Blevins v. Baker, 33 N. Car. 291; Treon v. Emerick, 6 Ohio, 391; Darant v. Cabbage (S. Car.), 2 Hill, 311; Welch v. Clark, 12 Vt. 686, 36 Am. Dec. 368; Newton v. Howe, 29 Wis. 531, 9 Am. Rep. 616.

6. Rorer, Jud. Sales (2d ed.), 450, § 1225.

7. Rorer, Jud. Sales (2d ed.), 474, § 1301; Fiero v. Betts, 2 Barb. 623; Popleston v. Skinner, 4 Dev. & B. 160.

8. Freeman, Co-tenancy, §§ 214, 215; Pettingill v. Bartlett, 1 N. H. 87; Walsh v. Adams, 3 Denio, 125; Haskins v. Everett, 36 Tenn. 531.

9. 2 Freeman, Executions (3d ed.), 1427, § 254a; Remington v. Cady, 10 Conn. 44; Gaar v. Hurd, 92 Ill. 315; Sibley v. Fernie, 73 La. (22 La. Ann.) 163; King v. Hubbell, 42 Mich. 597; Smokey v. Peters, 66 Miss. 471; Lawrence v. Burnham, 4 Nev. 361.

by becoming a tenant in common with another, could prevent his property being made subject to his debts.

A rule similar to that which applies to property owned in common is followed in regard to goods owned by a partnership.¹⁰ The sheriff, when levying upon the interest of one partner, takes possession¹¹ of the partnership property and transfers possession to the purchaser at the execution-sale, although the purchaser does not acquire any right to the specific chattels delivered to him, but a right to an accounting¹² only. All that he gets ultimately is the surplus, if any, after payment of all demands against the partnership.¹³

10. 1 Freeman, Executions (3d ed.), 525, § 125; *Andrews v. Keith*, 34 Ala. 722; *Harris v. Phillips*, 49 Ark. 58; *Wright v. Ward*, 65 Cal. 525; *Felt v. Clegghorn*, 2 Colo. App. 4; *Davis v. White*, 1 Houst. 228; *Jones v. Stratton*, 32 Ill. 202; *Hershfield v. Claffin*, 25 Kans. 166, 37 Am. Rep. 237; *Watson v. Gabby*, 57 Ky. 658; *Fogg v. Lawry*, 68 Me. 78, 28 Am. Rep. 19; *People's B'k v. Shyrock*, 48 Md. 427, 30 Am. Rep. 476; *Barrett v. McKenzie*, 24 Minn. 20; *Lloyd v. Tracy*, 53 Mo. App. 175; *Roop v. Herron*, 15 Nebr. 73; *Clements v. Jessup*, 36 N. J. Eq. 569; *Atkins v. Saxton*, 77 N. Y. 195; *Nixon v. Nash*, 12 Ohio St. 647, 80 Am. Dec. 390; *Cogswell v. Willson*, 17 Oreg. 31; *Tafford v. Hubbard*, 15 R. I. 326; *Haskins v. Everett*, 36 Tenn. 531; *De Forest v. Miller*, 42 Tex. 34; *Lamoille Co. v. Bixby*, 55 Vt. 235; *Graden v. Turner*, 15 Wash. 136; *Powers v. Large*, 69 Wis. 621, 2 Am. St. 767; *Holmes v. Mentze*, 4 A. & E. 131. *Contra*: *Russell v. Cole*, 167 Mass. 6, 57 Am. St. 432; *Richard v. Allen*, 117 Pa. St. 226, 2 Am. St. 432.

11. In some states the officer is not allowed to take exclusive possession of partnership property. 1 Freeman, Executions (3d ed.), 526, § 125; 2 Freeman, Executions (3d ed.), 1428, § 254a; *Russell v. Cole*, 167 Mass. 6, 57 Am. St. 432; *Morrison v. Blodgett*, 8 N. H. 233, 29 Am. Dec. 653; *Richard v. Allen*, 117 Pa. St. 226, 2 Am. St. 652.

12. 2 Freeman, Executions (3d ed.), 1429, § 254a. When the interest of one partner is levied upon, the others can enjoin a sale until the interest of such partner is ascertained. *Place v. Sweetzer*, 16 Ohio, 142.

13. 1 Freeman, Executions (3d ed.), 527 § 125; *Rorer*, Jud. Sales (2d ed.), 451, § 1228; *Robinson v. Tevis*, 38 Cal. 611; *Filley v. Phelps*, 18 Conn. 294; *Bevan v. Allee* (Del.), 3 Harr. 80; *Gerard v. Bates*, 124 Ill. 150, 7 Am. St. 350; *Williams v. Lewis*, 115 Ind. 45, 7 Am. St. 405; *Levy v. Cowan*, 78 La. (27 La. Ann.) 556; *Russell v. Cole*, 167 Mass. 6, 57 Am. St. 432; *Haynes v. Knowles*, 36 Mich. 407; *Atwood v. Mere-*

§ 239. **Execution Sales—Levy upon Public Property or upon Property in Custody of the Law.** If a judgment has been obtained against a county, an execution cannot be levied upon the private property of an inhabitant thereof, because it would lead to a multiplicity of suits; and the absurd result might follow that if the creditor himself were an inhabitant of the county, a levy could be made upon his own private property to satisfy his claim. The funds of the county not otherwise appropriated should be applied on the judgment, and a tax levied if necessary; and if the authorities fail or refuse to act, they can be compelled to do so by mandamus. If there are no funds or no power to levy a tax, the legislature should be invoked for authority.¹ Property of municipal or public corporations, used or useful for public purposes,² is not subject to execution, as the functions of government would be suspended or destroyed.

dith, 37 Miss. 635; *Garvin v. Paul*, 47 N. H. 158; *Atwood v. Impson*, 20 N. J. Eq. 150; *Eighth B'k v. Fitch*, 49 N. Y. 539; *Doe v. Hunt*, 33 N. Car. 42; *Sutcliffe v. Dohrman*, 18 Ohio, 181, 51 Am. Dec. 450; *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702; *Knox v. Shepler*, (S. Car.) 2 Hill, 595; *Garbett v. Veale*, 5 Q. B. 408, Dr. & W. 458, 8 Jur. 335.

Likewise, all that is attachable is the share of the partner in the surplus after the debts of the partnership are paid. *Waples*, Attach. (2d ed.) 182, § 250; *Peck v. Fisher*, 61 Mass. 386; *Staats v. Bristow*, 73 N. Y. 264; *Henry v. Cawthorn*, 60 Tenn. (4 Heisk.) 508.

1. *Emeric v. Gilman*, 10 Cal. 404, 70 Am. Dec. 742.

2. 1 *Freeman*, Executions (3d ed.), 538, § 126; *Clark v. Mobile Comm'rs*, 36 Ala. 621; *McMeekin v. State*, 9 Ark. 553; *Derr v. Lubey*, 8 D. C. (1 MacArthur) 187; *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Chicago v. Hasley*, 25 Ill. 595; *Davenport v. P. M. & F. Co.*, 17 Iowa, 276; *Rodman v. Musselman*, 75 Ky. 354; *Egerton v. Municipality*, 52 La. (1 La. Ann.) 435; *Dewey v. Garvey*, 130 Mass. 86; *School Dist. v. Gage*, 39 Mich. 484; *State v. Tiedeman*, 69 Mo. 306, 33 Am. Rep. 498; *Ross v. Allen*, 10 N. H. 96; *Lyon v. Elizabeth*, 43 N. J. L. 158; *Gooch v. Gregory*, 65 N. Car. 142; *Bulkly v. Eckert*, 3 Pa. St. 368; *Spencer v. School Dist.*, 11 R. I. 537; *Bank of Tenn. v. Dibrell*, 35 Tenn. 379; *Emery Co. v. Burreson*, 14 Utah, 328, 60 Am. St. 898; *Rollo v. Andes Co.*, 64 Va. (23 Gratt.) 509; *Brown v. Gates*, 15 W. Va. 131; *Hart v. New Orleans*, 13 Fed. 292.

Property in the custody of the law is not subject to execution,³ attachment, levy or sale;⁴ such as property in the possession of a receiver appointed by a court of equity;⁵ nor can money collected on execution by an officer be levied upon under a writ against the judgment creditor,⁶ as property once levied upon or taken under a writ of replevin⁷ is within the custody of the law and cannot be seized by another officer,⁸

3. 1 Freeman, Executions (3d ed.), 571, § 129; *Powell v. Rankin*, 80 Ala. 316; *Thorn v. Woodruff*, 5 Ark. 55; *Dunsmore v. Furstenfeldt*, 88 Cal. 522, 22 Am. St. 331; *Beers v. Place*, 36 Conn. 578; *Post v. Love*, 19 Fla. 634; *Roberts v. Dunn*, 71 Ill. 46; *Hackley's Ex'r v. Swigert*, 44 Ky. 86, 41 Am. Dec. 256; *Paradise v. Farmers' B'k*, 56 La. (5 La. Ann.) 710; *Hardy v. Tilton*, 68 Me. 165; *Watson v. Todd*, 5 Mass. 271; *Voorhies v. Session*, 34 Mich. 99; *Curling v. Hyde*, 10 Miss. 374; *Odiorne v. Colley*, 2 N. H. 66; *Force v. Brown*, 32 N. J. Eq. 118; *Wallace v. Wallace*, 48 N. Y. Supp. 593; *Harrington v. La Roche*, 13 Oreg. 344; *Chester v. Ralston*, 7 Pa. St. 482; *Conway v. Armington*, 11 R. I. 116; *Young v. Young* (S. Car.), 2 Hill, 425; *Burrows v. Wright*, 16 Vt. 619; *Parker v. Donnally*, 4 W. Va. 648.

4. *Rorer*, Jud. Sales (2d ed.), 448, § 1221.

5. *Field v. Jones*, 11 Ga. 413; *Jackson v. Lahee*, 114 Ill. 287; *McGowan v. Myers*, 66 Iowa, 99; *Glenn v. Gill*, 2 Md. 1; *Temper v. Brooks*, 40 Mich. 333; *Taylor v. Gillean*, 23 Tex. 508.

6. 1 Freeman, Executions (3d ed.), 576, § 130; *Willis v. Pitkin*, 1 Root, 47; *Gray v. Maxwell*, 50 Ga. 108; *Campbell v. Hasbrook*, 24 Ill. 243; *Winton v. State*, 4 Ind. 321; *First v. Miller*, 7 Ky. 311; *Staples v. Staples*, 4 Me. 532; *Jones v. Jones*, 1 Bland. 445, 18 Am. Dec. 327; *Thompson v. Brown*, 34 Mass. 462; *Marvin v. Hawley*, 9 Mo. 378, 43 Am. Dec. 547; *Baker v. Kenworthy*, 41 N. Y. 215; *State v. Lea*, 30 N. Car. 94; *Keating v. Spink*, 3 Ohio St. 124, 62 Am. Dec. 214; *Pren-tiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631; *Wood v. Wood*, 14 Q. B. (A. & E. N. S.) 397, 3 G. & D. 532, 13 L. J. Q. B. 141, 7 Jur. 325.

7. 1 Freeman, Executions (3d ed.), 605, § 135; *First B'k v. Dunn*, 97 N. Y. 149, 49 Am. Rep. 517; *Williamson v. Nealy*, 119 N. Car. 339.

8. 1 Freeman, Executions (3d ed.), 600, § 135; *Rorer*, Jud. Sales (2d ed.), 473, § 1295; 2 Freeman, Executions (3d ed.), 1498, § 267; *Logan v. Lucas*, 59 Ill. 237; *Jones Co. v. Case*, 26 Kans. 299, 40 Am. Rep. 310; *Moore v. Withenburgh*, 64 La. (13 La. Ann.) 22; *Lewis v. Buck*, 7 Minn. 104, 82 Am. Dec. 73; *Feusler v. Lammon*, 6 Nev. 209; *Winegardner v. Hafer*, 15 Pa. St. 144; *Hamilton v. Reedy*, 3 McCord, 38; *Schaller v. Wickersham*, 47 Tenn. 376; *Heye v. Moody*, 67 Tex. 615; *Riggs v. Johnson*, 73 U. S. 197.

unless the first levy was unauthorized⁹ or invalid.¹⁰

§ 240. **Execution Sales—Lien of Writ.** In many states, an execution creates a lien on the property of the judgment-debtor, so that a levy on his property takes priority over transfers, incumbrances and liens¹¹ subsequent to the commencement of the execution-lien.¹² At common law a *feri fucias* was a lien upon personal property from its *teste*,¹³ so that a sale made by the defendant thereafter was void because it was thought that if it were not so, every execution might be avoided by a sale, and it was presumed that the officer would execute such writs immediately, thus giving such notice in the neighborhood as would prevent any deception or fraud; but this notion of a retrospective lien was abused; writs were taken out one after another so as to obtain liens upon the goods of debtors without delivering the writs to the of-

In a few states a constructive levy can be made under such circumstances by notifying the officer making the first levy, that the property is levied upon subject to the previous levy. *Goodbar v. Brooks*, 57 Ark. 450; *Patterson v. Stephenson*, 77 Mo. 329; *Penland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. 38; 1 Freeman, Executions (3d ed.), 601, § 135; 2 Freeman, Executions (3d ed.), 1499, § 267.

9. 1 Freeman, Executions (3d ed.) 602, § 135.

10. 1 Freeman, Executions (3d ed.) 603, § 135; *Pump Co. v. Miller*, 105 Iowa, 674, 67 Am. St. 322.

11. 2 Freeman, Executions (3d ed.) 1004, § 195.

12. 2 Freeman, Executions (3d ed.) 1002, § 195. If property be sold after the lien has attached, such property can be seized in the hands of the buyer; 2 Freeman, Executions (3d ed.) 1003, § 195; *Churchill v. Warren*, 2 N. H. 298; *Hotchkiss v. McVickar*, 12 Johns. 406; *Jones v. Judkins*, 4 Dev. & B. 454; *Bates v. Moore*, 2 Bailey, 614; *Samuel v. Duke*, 3 M. & W. 622, 1 H. & H. 127, 6 Dowl. P. C. 536; although he was without actual notice of the lien. *Marshall v. Cunningham*, 13 Ill. 20; *Lindley v. Kelley*, 42 Ind. 294; *Million v. Riley*, 31 Ky. 359, 25 Am. Dec. 149; *Evans v. Barnes*, 32 Tenn. 292; *Duncan v. McCumber*, 10 Watts, 212.

13. 2 Freeman, Executions (3d ed.) 1014, § 199; *Palmer v. Clark*, 13 N. Car. 354, 21 Am. Dec. 340; *Edwards v. Thompson*, 35 Tenn. 720, 4 Am. St. 807.

ficer, by which means all commerce was made uncertain. To prevent this injustice to those who in good faith had purchased or taken incumbrances upon property between the day the writ was tested and the day of its actual issue, this rule has been changed in many states by statute,¹⁴ making the lien commence with the delivery of the writ to the officer,¹⁵ or from the time the levy is made.¹⁶ Taking out a writ of execution with an intention not to make an immediate levy but merely to secure the advantage of a lien on the property of the judgment-debtor, is in contemplation of law fraudulent even though the creditor be influenced by kind and charitable motives toward the debtor and without any design to injure others; and a lien under such circumstances cannot be asserted against other creditors, incumbrances, or purchasers.¹⁷

The lien attaches to all property which the debtor has or may acquire¹⁸ during the life of the execution; but an execution is lost by anything which destroys or suspends the judgment upon which it depends.¹⁹

§ 241. **Execution Sales—Conduct of.** It is the duty of the officer within a reasonable time to proceed by a sale¹ to realize the satisfaction of his writ, of which sale

14. *Jones v. Jones*, 1 Bland, 443, 18 Am. Dec. 327.

15. 2 Freeman, Executions (3d ed.) 1016, § 200.

16. 2 Freeman, Executions (3d ed.) 1020, § 201.

17. 2 Freeman, Executions (3d ed.) 1030, § 203; *Sweetzer v. Matson*, 153 Ill. 568, 46 Am. St. 911; *Price v. Shipps*, 16 Barb. 585; *Keyser's App.* 13 Pa. St. 409, 53 Am. Dec. 487; *Howes v. Cameron*, 23 Fed. 324; *Hunt v. Hooper*, 12 M. & W. 664, 1 D. & L. 626.

18. 2 Freeman, Executions (3d ed.) 1011, § 197; *Second B'k v. Gilbert*, 174 Ill. 485, 66 Am. St. 306. If, after an execution lien has attached to a horse, the horse is exchanged by the judgment-debtor for another, each horse is subject to the lien and may be taken and sold. *Orchard v. Williamson*, 29 Ky. 561, 22 Am. Dec. 102; *Grooms v. Dixon*, 5 Strobb. 149.

19. 2 Freeman, Executions (3d ed.) 1046, § 207; *Cohen v. Grier*, 4 McCord, 569.

1. *Jones v. Jones*, 1 Bland, 443, 18 Am. Dec. 327; *Poole v. Symonds*, 1 N. H. 289.

he must give notice,² and at the time and place³ specified in the notice, the officer must attend either in person or by deputy and take charge of the sale.⁴ Generally, the property sold must be present⁵ so it can be seen, handled and estimated by all persons desirous of bidding,⁶ and be ready for delivery.⁷

If the property consists of several articles the officer should sell them separately unless in his judgment they are more suited to go together⁸ and will bring more if sold in a "lump,"⁹ The sale must be at public auction

2. *Sawyer v. Wilson*, 61 Me. 529; *Carrier v. Esbaugh*, 70 Pa. St. 239; *Sutton v. Beach*, 2 Vt. 42.

3. *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440.

4. 2 *Freeman, Executions* (3d ed.) 1677, § 291; *Galbraith v. Drought*, 24 Kans. 591; *Kronschnable v. Knoblauch*, 21 Minn. 56; *Hamer v. McKinley Co.*, 52 Nebr. 705; *Heyer v. Deaves*, 2 Johns. Ch. 154; *Wallis v. Shelby*, 30 Fed. 747.

5. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749; *Kennedy v. Clayton*, 29 Ark. 270; *Smith v. Morse*, 2 Cal. 524; *Yoemans v. Bird*, 81 Ga. 340; *Wright v. Mack*, 95 Ind. 332; *Burns v. Ray*, 57 Ky. 392; *Penney v. Earle*, 87 Me. 167; *Hoysey v. Knowles*, 74 Md. 602; *Newman v. Hock*, 37 Mo. 207; *Stief v. Hart*, 1 N. Y. 20; *Ainsworth v. Greenlee*, 7 N. Car. 470; *Kopp v. Witmoyer*, 43 Pa. St. 219, 82 Am. Dec. 561; *Collins v. Montgomery*, 2 Nott & M. 392; *Brown v. Lane*, 19 Tex. 203.

6. 2 *Freeman, Executions* (3d ed.) 1624, § 283.

7. *Rorer, Jud. Sales* (2d ed.) 468, § 1283; *Tibbetts v. Jagaman*, 58 Ill. 43; *Baker v. Casey*, 19 Mich. 200. Otherwise great sacrifice undoubtedly would result if prospective purchasers could not examine the property and delivery could not be taken at once. 2 *Freeman, Executions* (3d ed.) 1673, § 290.

8. *Rorer, Jud. Sales* (2d ed.) 471, § 1290; *Bevan v. Byrd*, 48 N. Car. 297.

9. 2 *Freeman, Executions* (3d ed.) 1705, § 296; *Anniston Wks v. Williams*, 106 Ala. 324, 54 Am. St. 51; *Browne v. Ferrea*, 51 Cal. 552; *Hart v. Hines*, (D. C.) 10 App. Cas. 366; *Wilbanks v. Untriner*, 98 Ga. 801; *Smith v. Huntoon*, 134 Ill. 24, 23 Am. St. 646; *Benton v. Wood*, 17 Ind. 260; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 336; *Pritchard v. Madren*, 31 Kans. 38; *Terry v. Swinford*, (Ky.) 41 S. W. 553; *Danneel v. Klein*, 98 La. (47 La. Ann.) 928; *Hicks v. Perry*, 7 Mo. 346; *State v. Morgan*, 29 N. Car. 387, 37 Am. Dec. 329; *Power v. Larrabee*, 3 N. Dak. 502, 44 Am. St. 577; *Klopp v. Witmoyer*, 43 Pa. St. 219, 82 Am. Dec. 561. In such a case a sale *en masse* is not only

to the highest bidder¹⁰ unless he lacks capacity.

If the plaintiff, who is entitled to the proceeds of the sale, is the purchaser, and there is no prior writ,¹¹ it is not necessary to go through the form of paying the officer¹² any more than the costs. If a purchaser refuse to comply with his bid, the officer may resell¹³ at the same time and place;¹⁴ or he can maintain an action for the amount.¹⁵

The sale must be discontinued as soon as sufficient money has been realized to satisfy the writ.¹⁶ If the proceeds of the sale are not sufficient to satisfy the judgment in full, it is satisfied *pro tanto*.

proper but necessary; 2 Freeman, Executions (3d ed.) 1712, § 296; as where several articles are subject to a mortgage which cannot be apportioned among them. 2 Cobbey, Chat. Mort. 929, § 729; Smith v. Menominee Judge, 53 Mich. 560; Locke v. Shreek, 54 Nebr. 472; Tift v. Barton, 4 Den. 171; Cotton v. Marsh, 3 Wis. 221.

10. 2 Freeman, Executions (3d ed.) 1693, § 293; Rorer, Jud. Sales (2d ed.) 469, § 1285; Swartzell v. Martin, 16 Iowa, 519; Blanton v. Morrow, 42 N. Car. 47.

11. Rorer, Jud. Sales (2d ed.) 471, § 1292; Swartzell v. Martin, 16 Iowa, 519.

12. Robertson v. Van Cleave, (Ind.) 26 N. El. 899; Nichols v. Ketcham, 19 Johns. 92; Rorer, Jud. Sales (2d ed.) 471, § 1291.

13. Rorer, Jud. Sales (2d ed.) 461, § 1258; McClure v. Williams, 37 Tenn. 718.

14. Rorer, Jud. Sales (2d ed.) 480, § 1317; Lamkin v. Crawford, 8 Ala. 153; Haynes v. Breaux, 67 La. (16 La. Ann.) 142; Wilson v. Loring, 7 Mass. 392; Illingworth v. Miltenberger, 11 Mo. 80; Bigley v. Risher, 63 Pa. St. 152; Minter v. Dent, 2 Bailey, 291; Lauer v. Steinbauer, 14 Wis. 70.

15. 2 Freeman, Executions (3d ed.) 1839, § 813h; McCartney v. King, 25 Ala. 681; Halleck v. Guy, 9 Cal. 181, 70 Am. Dec. 643; Webb v. Perkins, 60 Ill. App. 91; Dunn v. Frazier, 8 Blackf. 432; Cameron v. Logan, 8 Iowa, 434; Armstrong v. Vroman, 11 Minn. 220, 88 Am. Dec. 81; Hand v. Grant, 18 Miss. 514, 43 Am. Dec. 528; Jones v. Null, 9 Nebr. 254; Townshend v. Simon, 38 N. J. L. 239; McKee v. Lineberger, 69 N. Car. 217; Friedly v. Scheetz, 9 Serg. & R. 156, 11 Am. Dec. 691; Moore v. Akin, (S. Car.) 2 Hill, 403.

16. Halcombe v. Loudermilk, 48 N. Car. 491; Aldred v. Constable, 6 Q. B. 370, 8 Jur. 956.

§ 242. **Execution Sales—Return of Writ.** It is the duty of the officer to return the writ to the court whence it issued,¹ with a brief, written,² signed³ statement indorsed thereon or attached thereto,⁴ of the steps taken by him in executing it.⁵ This is called “making a return.”⁶

The day for making a return is called the “return day.” The writ, whether executed or not,⁷ must be returned at its return day.⁸ A levy must be made during the lifetime of the writ.⁹ If the officer has been unable to find any property subject to the writ, he makes a return *nulla bona* (Latin, no goods); but if he has obtained funds sufficient to satisfy the writ, the return is *feri feci* (Latin, I have caused to be made); or the return may be part *feri feci* and part *nulla bona*; or it may show a levy without a sale.¹⁰

If property be not found on which to levy the *feri facias* within the lifetime of the writ, then on return thereof the proper course is to sue out an *alias*¹¹ *feri facias* if property subsequently be found, and so on in

1. *Wright v. Marvin*, 59 Vt. 437.

2. *Wellington v. Gale*, 18 Mass. 483.

3. *Cox v. Montford*, 66 Ga. 62; *Stevens v. Bachelder*, 28 Me. 218; *Bennett v. Vinyard*, 34 Mo. 216; *Dewar v. Spence*, 2 Whart. 211, 30 Am. Dec. 241; 3 Freeman, Executions (3d ed.) 2025, § 355.

4. *Dickson v. Peppers*, 29 N. Car. 429; *Hammett v. Farmer*, 26 S. Car. 566; *Union B'k v. Barnes*, 29 Tenn. 244.

5. 3 Freeman, Executions (3d ed.) 2015, § 353.

6. *Jones v. Goodbar*, 60 Ark. 182.

7. 3 Freeman, Executions (3d ed.) 2016, § 353; *Brown v. Baker*, 6 Port. 503.

8. 3 Freeman, Executions (3d ed.) 2017, § 353; *State v. Records*, (Del.) 3 Harr. 146; *Wallis v. Bourg*, 67 La. (16 La. Ann.) 176; *Morrow v. Allison*, 33 N. Car. 217; *Clingman v. Barrett*, 25 Tenn. 30.

9. *Rorer*, Jud. Sales (2d ed.) 456, § 1241; *Gaines v. Clark*, 4 Ky. 608; *Wack v. Stevenson*, 54 Mo. 481; *Vail v. Lewis*, 4 Johns. 450; *Prescott v. Wright*, 6 Mass. 20; *McElwee v. Sutton*, 2 Bailey, 361.

10. 3 Freeman, Executions (3d ed.) 2026, § 355.

11. Latin, at another time. The second writ reads; “We command you, as we have before commanded you,” etc. (*sicut alias*).

succession, as a like necessity occurs, a *pluries*¹² and *alias pluries*;¹³ but if a levy has been effected, and, from any cause not affecting the validity of the writ or of the levy, the writ be returned without a sale of the property levied, then an order for the issuing of a writ of *venditioni exponas*¹⁴ is to be obtained, commanding the officer to sell the unsold property levied on the former writ of *feri facias*.¹⁵

§ 243. **Attachment—Object—Definition.** Under the old common law if a debtor wrongfully refused payment the only method of procedure was first to obtain a judgment against him and then to levy upon his property. Under this method a dishonest debtor could escape payment by concealing his property or by removing it from the jurisdiction as soon as notified of the institution of a suit against him, so that when a judgment finally was obtained, there was nothing upon which a levy could be made; or a debtor might become insolvent pending a suit. Likewise, a debtor might have a great amount of property within the jurisdiction in which his creditor lived, yet, as long as the debtor kept out of that jurisdiction so that he could not be summoned personally in any suit instituted against him, it was impossible to proceed with the suit and to obtain a judgment. To remedy these evils statutes have been enacted to reach the property of debtors in such cases by a proceeding known as attachment. Attachment is a remedy for the collection of ordinary debt by preliminary levy upon property of the debtor, thus creating a lien thereon and conserving the property for enforcement of the lien¹ by execution after the lien shall have been perfected by judgment.²

12. Latin, many times.

13. Sometimes called a second *pluries*.

14. Latin, that you expose for sale.

15. Rorer, *Jud. Sales* (2d ed.) 440, § 1203.

1. Waples, *Attach.* (2d ed.) 1, § 1.

2. *Union B'k v. Byram*, 131 Ill. 92. .

§ 244. **Attachment—When Allowed.** In prominent features nearly all of the attachment laws of the country are alike. In most states, the circumstances authorizing proceeding by attachment relate either to absence of the debtor, or to absence of his property, or to both.

The circumstances allowing attachment on account of the absence of the defendant may arise when he is either a nonresident of the state or out of its jurisdiction, is about to remove from the state, has absconded, or is concealing himself to avoid summons. The circumstances allowing attachment on account of property arise when the debtor is about to remove, to conceal or fraudulently to convey it³ without retaining enough property not exempt with which to pay all of his debts.⁴

§ 245. **Attachment—Procedure.** To obtain a writ of attachment an affidavit conforming to the statute must be made, setting forth the indebtedness and the grounds for the attachment.⁵ If the lien on the property attached does not become perfected by a judgment, the creditor is liable in damages⁶ for the injury directly⁷ resulting from interference with the property; and, to insure the recovery of such damages, the statute usually provides for the creditor giving a bond with sureties. An

3. *Waples*, *Attach.* (2d ed.) 44, § 61; *Knowles v. Stees*, 79 Ala. 427; *Simon v. Association*, 54 Ark. 58; *Burgert v. Borchert*, 59 Mo. 80; *Washburn v. McGuire*, 19 Nebr. 98; *Leitensdorfer v. Webb*, 1 N. Mex. 34; *Victor v. Henlein*, 34 Hun. 362; *Clark v. Ingraham*, 15 Phila. 646; *Sollinsky v. Bank*, 85 Tenn. 363; *Keith v. Armstrong*, 65 Wis. 225.

4. *Haber v. Nassitta*, 12 Fla. 539; *Montague v. Gaddis*, 37 Miss. 452.

5. *Waples*, *Attach.* (2d ed.) 84, § 111.

6. *Waples*, *Attach.* (2d ed.) 12, § 18; *Kinsey v. Wallace*, 36 Cal. 462; *Lowenstein v. Monroe*, 55 Iowa, 32; *Carver v. Shelley*, 17 Kana. 472; *Nolle v. Thompson*, 60 Ky. 121; *McDaniel v. Gardner*, 85 La. (34 La. Ann.) 341; *Turner v. Lytle*, 59 Md. 199; *Cochrane v. Quackenbush*, 29 Minn. 376; *Clark v. Brott*, 71 Mo. 473; *Raymond v. Green*, 12 Nebr. 215; *Wagner v. Stocking*, 22 Ohio St. 297; *Smith v. Story*, 23 Tenn. 169; *Hardeman v. Morgan*, 48 Tex. 103.

7. *Higgins v. Mansfield*, 62 Ala. 267.

attachment writ is levied in the same way as an execution-writ. There usually is a further provision in the statute that after an attachment writ has been levied and while the litigation is pending, the defendant can recover possession of his property by giving what is known as a "forthcoming bond," conditioned for the return of the property by the defendant or for the payment of its value if a judgment ultimately be obtained against him in the suit, or conditioned for the payment of such judgment.

§ 246. **Garnishment.** Choses in action cannot be levied upon; hence if A. should recover a judgment against X., and all the property which X. possessed was a money-claim against M., it would be impossible under the common law for A. to levy upon the debt owing to X. by M. Garnishment is a proceeding under which A. could compel M. to pay the money to A. instead of to X., thus satisfying the judgment of A. to the extent of the amount owing by M., and cancelling the indebtedness from M. to X.

Garnishment is the admonition, judicially given to the attachment defendant's debtor or holder of property, warning him against payment or restoration to the defendant, and bidding such holder or debtor to retain the property or the credit subject to the order of the court.⁸ The person owing, or having property of, the defendant is called the garnishee; and the verb is "to garnish." The plaintiff by the process of garnishment virtually sues the garnishee for a debt due to the defendant; the plaintiff takes the shoes of the latter and asserts the rights which the latter has against a third person.⁹ A judgment

8. Waples, *Attach.* (2d ed.) § 37, § 469.

9. Waples, *Attach.* (2d ed.) § 39, § 472; *Henderson v. Insurance Co.*, 72 Ala. 38; *Hassie v. Congregation*, 35 Cal. 378; *Hallowell v. Leafgreen*, 3 Colo. App. 22; *Tim v. Franklin*, 87 Ga. 95; *Delacroix v. Hart*, 75 La. (24 La. Ann.) 141; *Massachusetts B'k v. Bullock* 120 Mass. 86; *Jones v. Huntington*, 9 Mo. 249; *Burnham v. Hopkinson*, 17 N. H. 259; *Clarke v. Farnum*, 7 R. I. 174.

against the garnishee is dependent upon the final judgment against the principal defendant.¹⁰

§ 247. **Judicial Sales.** A Judicial Sale is one made *pendente lite*¹¹ in court, the court being the vendor;¹² and occurs in chancery, in probate,¹³ and in admiralty¹⁴ proceedings. An execution sale is not a judicial one,¹⁵ there being several distinctions between them. An execution sale is made by an officer appointed by, and holding under, the law,¹⁶ such as the sheriff, and is an executive or ministerial act, the officer being the vendor;¹⁷ whereas a judicial sale is conducted by anyone designated by the court, who may be a master in chancery or a private person as commissioner, who acts by authority and direction of, and as the instrument of, the court and subject to its control.¹⁸ In an execution sale no particular property is designated; while a judicial sale distinctly specifies the property to be sold. The terms and manner of an execution sale are regulated by law;¹⁹ in a judicial sale, by the court.²⁰ An execution sale is final and valid as soon as made; while a judicial sale is not binding and conclusive until expressly approved and ratified by the court.²¹ An execution sale is made after

10. Waples, *Attach.* (2d ed.) 342, § 475.

11. Latin, in a pending suit.

12. Rorer, *Jud. Sales* (2d ed.) 1, § 1.

13. Rorer, *Jud. Sales* (2d ed.) 18, § 29.

14. Rorer, *Jud. Sales* (2d ed.) 214, § 512.

15. *Griffith v. Fowler*, 18 Vt. 394.

16. Rorer, *Jud. Sales* (2d ed.) 246, § 590.

17. Rorer, *Jud. Sales* (2d ed.) 6, § 9; *Gowan v. Jones*, 9 Miss. 164; *Griffith v. Fowler*, 18 Vt. 394.

18. *Thorn v. Ingram*, 25 Ark. 52; *Southern B'k v. Humphreys*, 47 Ill. 227; *Forman v. Hunt*, 33 Ky. 621; *Hurt v. Stull*, 4 Md. Ch. 391; *Mason v. Osgood*, 64 N. Car. 467; *Vandever v. Baker*, 13 Pa. St. 121; *Wolf v. Sharp*, 10 Rich. 60; *Blossom v. R. R. Co.*, 70 U. S. 207.

19. *Todd v. Philhower*, 24 N. J. L. 796.

20. *Knarr v. Conaway*, 42 Ind. 260.

21. *Halleck v. Guy*, 9 Cal. 181; *Myers v. Nourse*, 5 Fla. 16; *Wooley v. Russ*, 75 La. (24 La. Ann.) 482; *Cazet v. Hubbell*, 36 N. Y.

the litigation is ended;²² whereas a judicial sale is interlocutory. Execution sales are within the statute of frauds;²³ but judicial sales are not,²⁴ for the reason that the court will not allow itself to be trifled with by a person offering a bid to the court for its consideration and then receding therefrom. An appeal does not lie from an execution sale;²⁵ whereas from the decree or order of sale and from the order of confirmation an appeal may be taken.²⁶ In an execution sale the purchaser is not subject to the jurisdiction of the court; but it is otherwise with the bidder in a judicial sale.²⁷ However, so far as the conduct of the sale is concerned, there is not much difference between them.

§ 248. **Exemptions—Effect.** Exemption is freedom which the owner of property has from liability to have it taken without his consent for the satisfaction of claims against him. The designation likewise is given to the property which is thus exempt.

At common law all of the property of a debtor, except that in which he was clad,¹ could be taken, if necessary, to satisfy his creditors; but statutes have been enacted in the various states providing that certain property shall be exempt from execution, attachment,² garnish-

677; *Stimson v. Mead*, 2 R. I. 541; *Lasell v. Powell*, 47 Tenn. 277; *Brown v. Christie*, 27 Tex. 73; *Gross v. Percy*, 3 Patt. & H. 483; *Att'y Gen'l v. Cay*, 1 Ves. Sr. 218.

22. *Rorer, Jud. Sales* (2d ed.) 12, § 18.

23. *Rorer, Jud. Sales* (2d ed.) 14, 253, § § 23, 606.

24. *Rorer, Jud. Sales* (2d ed.) 13, 214, § § 23, 511; *Blagden v. Bradbear*, 12 Ves. 466.

25. *Rorer, Jud. Sales* (2d ed.) 15, § 26.

26. *Rorer, Jud. Sales* (2d ed.) 14, § 25.

27. *Rorer, Jud. Sales* (2d ed.) 18, § 28.

1. 2 *Freeman, Executions* (3d ed.) 1238, § 232; *Cooke v. Gibbs*, 3 Mass. 193; *Bowne v. Witt*, 19 Wend. 475; *Sunbolf v. Alford*, 3 M. & W. 248.

2. *Waples, Attach.* (2d ed.) 494, § 719; *Mayers v. Paxton*, 78 Tex. 196.

ment,* and distress. These enactments differ greatly from one another, and the student should consult the statutes of his own state to ascertain the exemptions allowed therein.

§ 249. Exemptions—Against What Claims Valid. In some states exemptions can be asserted against judgments of every character;⁴ in others they can be claimed against judgments founded on contract only and not against judgments founded on tort.⁵ In some states there is no exemption against certain specified claims.⁶ Property generally is subject to execution for the price thereof⁷ under a judgment against the buyer⁸ based on the contract of purchase,⁹ provided the creditor is able to identify the property.¹⁰

§ 250. Exemptions—Who Entitled to—In What Property. In some states, “heads of families” are favored more than the others in the matter of exemption; but under the rule that the statute is to be given a liberal construction a broad meaning is given by the courts to this expression.¹¹ Some statutes allow the selection of

3. Waples, *Attach.* (2d ed.) 505, § 737.

4. 2 Freeman, *Executions* (3d ed.) 1156, § 217; *Loomis v. Gerson*, 62 Ill. 11; *Dellinger v. Tweed*, 66 N. Car. 206; *Smith v. Omana*, 17 Wis. 395.

5. 2 Freeman, *Executions* (3d ed.) 1153, § 217; *Dangaix v. Lunsford*, 112 Ala. 403; *Massie v. Enyart*, 33 Ark. 688; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Kenyon v. Gould*, 61 Pa. St. 292.

6. 2 Freeman, *Executions* (3d ed.) 1157, § 217; *Brown v. West*, 73 Me. 23; *Shreck v. Gilbert*, 52 Nebr. 813; *Taylor v. Rice*, 1 N. Dak. 72. As claims for wages. *McBride v. Reitz*, 19 Kans. 123.

7. 2 Freeman, *Executions* (3d ed.) 1160, § 217; *Friedman v. Sullivan*, 48 Ark. 213; *Behymer v. Cook*, 5 Colo. 395; *Roberts v. McGur*, 82 Mich. 221; *Rodgers v. Brackett*, 34 Minn. 279; *Straus v. Rothan*, 102 Mo. 261; *Houlehan v. Rassler*, 73 Wis. 557.

8. *Buckingham v. Nelson*, 42 Miss. 417.

9. 2 Freeman, *Executions* (3d ed.) 1162, § 217; *Hoyt v. Van Alstyne*, 15 Barb. 568.

10. *Wagner v. Olson*, 3 N. Dak. 69.

11. A husband and father is entitled to his exemptions although he may live apart from his wife and children. 2 Freeman, *Executions*

property by the debtor to a specified value;¹ others designate specific articles² which cannot be taken in exe-

(3d ed.) 1193, § 223; *Norman v. Bellman*, 16 Ind. 156; *Carrington v. Harrin*, 67 Ky. 624; *Roberts v. Moudy*, 30 Nebr. 683, 27 Am. St. 426; *Bonnel v. Dunn*, 29 N. J. L. 435; *Woodward v. Murray*, 18 Johns. 400; *Rogers v. Fox*, (Tex. App.) 16 S. W. 781.

It is not necessary that a person have a wife or children to be the head of a family. 2 *Freeman, Executions* (3d ed.) 1185, § 222. It is sufficient if he has his mother living with, and supported by, him; *State v. Kane*, 42 Mo. App. 253; see, however, *Riley v. Hitzler*, 49 Ohio St. 651; or a brother or sister; *Marsh v. Lazenby*, 41 Ga. 153; *Parsons v. Livingston*, 11 Iowa, 104, 77 Am. Dec. 135; *McMurray v. Shuck*, 69 Ky. 111, 99 Am. Dec. 662; or undertakes the support of his minor stepchildren. 2 *Freeman, Executions* (3d ed.) 1187, § 222; *Holloway v. Holloway*, 86 Ga. 576, 22 Am. St. 484; *Capek v. Kropik*, 129 Ill. 509. If, after the death of the husband, the widow becomes charged with the care and maintainance of the children, she succeeds him as head of the family. *Becker v. Becker*, 47 Barb. 497; *Bachman v. Crawford*, 22 Tenn. 213, 39 Am. Dec. 163. Sometimes the word "householder" instead of "head of a family" is used in the statute; but the words are very nearly synonymous. 2 *Freeman, Executions* (3d ed.) 1191, § 223.

1. In such states, the debtor is at liberty to hold any species of personal property; 2 *Freeman, Executions* (3d ed.) 1280, § 236c; *Darby v. Rouse*, 75 Md. 26; *Bernheim v. Andrews*, 65 Miss. 28; *Cunningham v. Conway*, 25 Nebr. 615; *Swandale v. Swandale*, 25 S. Car. 339; including choses in action; *Probst v. Scott*, 31 Ark. 652; *Leggett v. Van Horn*, 76 Ga. 795; *Miller v. Mahoney*, (Ky.) 29 S. W. 879; *Mace v. Heath*, 34 Nebr. 54; *Frost v. Naylor*, 68 N. Car. 325; *Chilcote v. Conley*, 36 Ohio St. 545; *Strouse's Ex'r v. Becker*, 44 Pa. St. 206; such as money due; *Rutter v. Shumway*, 16 Colo. 95; *Fanning v. First B'k*, 76 Ill. 53; and corporate stock. *Roden v. Brown*, 103 Ala. 324.

2. *Citizens' B'k v. Hargraves*, 164 Fed. 613. As provisions; 2 *Freeman, Executions* (3d ed.) 1241, § 233; wearing apparel, household furniture; 2 *Freeman, Executions* (3d ed.) 1232, § 231; tools of trade; *Perkins v. Wisner*, 9 Iowa, 320; *Caswell v. Keith*, 78 Mass. 351; *Harris v. Haynes*, 30 Mich. 140; *Abrams v. Pender*, 44 N. Car. 260; implements of husbandry; 2 *Freeman, Executions* (3d ed.) 1217, § 226a; certain domestic animals, seed for an annual crop, and wages, earnings and salaries. 2 *Freeman, Executions* (3d ed.) 1243, § 234. The wages of sailors are protected from seizure by the provisions of U. S. Rev. St. § 4536, U. S. Comp. St. 1901, 3082. *Wilder v. Inter-Island Co.*, 211 U. S. 239; 53 L. ed. 58, aff'g 17 Hawaii, 416; *Benedict, Admiralty Pr.* 286, § 507. Sometimes policies of life insurance and their proceeds are exempt. 2 *Freeman, Executions* (3d ed.) 1261, § 234b.

cution without the consent of the debtor, being considered necessary for the comfort and support of the debtor and his family.³

§ 251. **Exemptions—How Asserted.** In some states, the officer may proceed to levy upon any property until the debtor claims his exemptions;⁴ in others, if property is necessarily exempt, the officer is not justified in proceeding to levy and sell such property;⁵ in still other states, the officer must inform the debtor of his rights and must give him an opportunity to select the property to be claimed as exempt.⁶ Unless prescribed by statute⁷ a claim to exemption need not be formal⁸ nor even written;⁹ and usually may be made at any time prior to the sale.¹⁰ If the debtor has more of a particular kind

3. 2 Freeman, Executions (3d ed.) 1061, § 208.

4. 2 Freeman, Executions (3d ed.) 1087, § 211; *Lackland v. Rogers*, 113 Ala. 529; *Barton v. Brown*, 68 Cal. 11; *Boesker v. Pickett*, 81 Ind. 554; *State v. Boulden*, 57 Md. 314; *Gilleland v. Rhoads*, 34 Pa. St. 187; *Oliver v. White*, 18 S. Car. 235; *Pirie v. Harkness*, 3 S. Dak. 173.

5. *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. 272; *Stirman v. Smith*, (Ky.) 10 S. W. 131; *Woods v. Keyes*, 96 Mass. 236, 92 Am. Dec. 765; *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. 589; *Howard v. Rugland*, 35 Minn. 388; *Frost v. Mott*, 34 N. Y. 253; *Henson v. Edwards*, 32 N. Car. 43; *Frost v. Shaw*, 3 Ohio St. 270; *Denny v. White*, 42 Tenn. 282, 88 Am. Dec. 596; *Ross v. Lister*, 14 Tex. 469; *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219.

6. 2 Freeman, Executions (3d ed.) 1091, § 211; *People v. Palmer*, 46 Ill. 393, 95 Am. Dec. 413.

7. *Gresham v. Walker*, 10 Ala. 370; *Gavitt v. Doub*, 23 Cal. 79.

8. 2 Freeman, Executions (3d ed.) 1096, § 212; *Bassett v. Inman*, 7 Colo. 270; *Braswell v. McDaniel*, 74 Ga. 319; *Finnin v. Malloy*, 33 N. Y. Super. 390; *Northrup v. Cross*, 2 N. Dak. 433; *Clark v. Bond*, 54 Tenn. (7 Bart.) 238.

9. *McClusky v. McNeely*, 8 Ill. 578; *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 733.

10. 2 Freeman, Executions (3d ed.) 1097, § 212; *Boylston v. Rankin*, 114 Ala. 408; *McMichael v. Grady*, 34 Fla. 219; *Robinson v. Hughes*, 117 Ind. 293, 10 Am. St. 45; *Dennis v. Beuffer*, 54 Kans. 527; *McGee v. Anderson*, 40 Ky. 189, 36 Am. Dec. 570; *State v. Emerson*, 74 Mo. 607; *State v. Carson*, 27 Nebr. 501, 20 Am. St. 631; *Shepherd*

of property than is exempt he, and not the officer, has the right to select which he will claim,¹¹ and has a reasonable time¹² in which to do so.

§ 252. **Exemptions—Waiver.** In the absence of constitutional or statutory provisions,¹³ an agreement in advance by the debtor waiving his exemptions is against public policy as tending to make the law a nullity; and is void.¹⁴ Where he is allowed to waive his exemptions, giving a lien¹⁵ on property is a waiver.¹⁶

v. Murrill, 90 N. Car. 208; *Close v. Sinclair*, 38 Ohio St. 530; *Noyes v. Belding*, 5 S. Dak. 603; *Pyett v. Rhea*, 62 Tenn. (6 Heisk.) 136.

In Pennsylvania the debtor must interpose his claim before trouble and expense have been incurred in preparing for a sale; *Yost v. Heffner*, 69 Pa. St. 68; unless he did not have knowledge of the levy. *Howard B. & L. A. v. P. & R. R. R.*, 102 Pa. St. 455; 2 *Freeman, Executions* (3d ed.) 1098, § 212.

11. 2 *Freeman, Executions* (3d ed.) 1102, § 212a; *Bray v. Laird*, 44 Ala. 295; *Parker v. Haley*, 60 Iowa, 325; *Lockwood v. Younglove*, 27 Barb. 505; *Cutler v. Thomas*, 74 N. Car. 51. The debtor may select the most valuable articles; *Conway v. Roberts*, 38 Nebr. 456; *Fuller v. Sparks*, 39 Tex. 136; and those which are unincumbered. *Bayne v. Patterson*, 40 Mich. 658; *Richardson v. Chase*, 64 N. H. 617.

12. 3 *Freeman, Executions* (3d ed.) 1106, § 212a; *Wright v. Deyoe*, 86 Ill. 490; *Austin v. Swank*, 9 Ind. 109; *Frost v. Shaw*, 3 Ohio St. 274; *Elliott v. Flanigan*, 37 Pa. St. 425; *Pyett v. Rhea*, 62 Tenn. (6 Heisk.) 136; *Zielke v. Morgan*, 50 Wis. 560.

13. In a few states there are constitutional or statutory provisions allowing a total or a partial waiver of exemptions by prospective agreement. 2 *Freeman, Executions* (3d ed.) 1145, § 216; *Brown v. Leitch*, 60 Ala. 314, 31 Am. Rep. 42; *Hahn v. Allen*, 93 Ga. 612; *Hoisington v. Huff*, 24 Kans. 379.

14. 2 *Freeman, Executions* (3d ed.) 1149, § 216; *Carter v. Carter*, 20 Fla. 558, 51 Am. Rep. 618; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Moxley v. Ragan*, 73 Ky. 156, 19 Am. Rep. 61, 13 Am. Law Reg. N. S. 743; *Levicks v. Walker*, 66 La. (15 La. Ann.) 245, 9 Am. Law Reg. 112; *Kneettle v. Necomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Branch v. Tomlinson*, 77 N. Car. 388; *Mills v. Bennett*, 94 Tenn. 651, 45 Am. St. 66; *Maxwell v. Reed*, 7 Wis. 582. *Contra*: *Bowman v. Smiley*, 31 Pa. St. 225, 72 Am. Dec. 728.

15. As a mortgage. 1 *Cobbey, Chat. Mort.*, 241, § 197; *Conway v. Wilson*, 44 N. J. Eq. 457.

16. The waiver is limited to the lien created; 1 *Cobbey, Chat. Mort.*, 244, § 199; *Weis v. Levy*, 69 Ala. 311; *Tryon v. Mansir* 84 Mass.

§ 253. **Insolvency.** Insolvency is the state of a person who is unable to pay his debts as they become due in the ordinary course of business.¹ The business affairs of a person might be in such shape that he would be unable to pay all claims against him if presented at one time, yet he would not necessarily be insolvent. On the other hand, the assets of a person might exceed his liabilities, and yet he might be unable to pay his debts as they matured; hence technically he would be insolvent. Like many other legal terms, the word is used in other senses in different connections.

Many of the states have enacted laws allowing an insolvent debtor to assign all of his property to a trustee for the benefit of his creditors, sometimes called a "voluntary assignment," the object of such statutes being to secure a fair and honest *pro rata* division of the property of the debtor among his creditors, and to secure the debtor from present molestation. The trustee proceeds as advantageously as possible to convert the property into cash and to distribute it as far as it will apply.

§ 254. **Bankruptcy—Definition.** Bankruptcy, whatever may have been its meaning in former times, seems in modern times to be one phase of insolvency, indicating the *status* of a person subject to a statutory system under which his present property not exempt, is turned over to a court, though proper proceedings to be sold and the proceeds distributed *pro rata* among his existing creditors, and he is discharged from future liability for any unpaid balance of the debts due to such creditors. The debtor, in such a case, is known as a "bankrupt."

219; and such chattels are not liable to levy and sale on execution for other debts than the one secured. *Jones v. Scott*, 10 Kans. 33; *Collett v. Jones*, 41 Ky. 19; 46 Ky. 586, 36 Am. Dec. 586; *Buckley v. Wheeler*, 52 Mich. 1; *State v. Carroll*, 24 Mo. App. 358; *McGivney v. Childs*, 41 Hun, 607.

1. *Sabin v. Columbia Co.*, 25 Oreg. 15, 42 Am. St. 756.

§ 255. **Bankruptcy Statutes.** Under the Federal Constitution³ Congress has power to establish "uniform laws on the subject of bankruptcies throughout the United States." This, however, does not restrict a state from enacting a bankruptcy law⁴ provided it does not violate other constitutional provisions, such as that it must not impair the obligation of a contract;⁵ but when a Federal Bankruptcy act is in force, all state laws in conflict⁶ therewith are suspended,⁷ becoming effective again whenever the Federal act is repealed, without any further action being taken by the state.⁸ Congress has enacted four bankruptcy laws, the last on July 1, 1898,⁹ which with some amendment, is now in force.

§ 256. **Bankruptcy — Voluntary and Involuntary.** Bankruptcy may be either voluntary or involuntary, being voluntary when the debtor acts to accomplish it for the purpose of freeing himself from his creditors; and involuntary when his creditors force him into it in opposition to his wishes.¹⁰ Any natural person except a wage-earner or a person engaged chiefly in farming, any unincorporated company, and corporations engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the

3. U. S. Const., Art. I, Sec. VIII, clause 4.

4. *Sturges v. Crowninshield*, 17 U. S. 122.

5. A bankruptcy law enacted by a state could not affect debts arising out of contracts existing at the time the law went into effect, nor out of contracts made without the state. *Ogden v. Saunders*, 25 U. S. 213. Otherwise a creditor might be deprived of a part or of all of his claim, thus impairing his contract. Contracts made within the state after the enactment of a state bankruptcy law, are governed by it, as the law theoretically becomes a part of the contract.

6. *Martin v. Berry*, 37 Cal. 208. See a learned article by Samuel Williston in 22 *Harvard Law Rev.*, 547.

7. *Lothrop v. Highland Co.*, 128 Mass. 120.

8. *Palmer v. Hixon*, 74 Me. 447.

9. Chap. 541, 30 Stat. 544; U. S. Comp. St. 1901, p. 3418.

10. Only a small percentage of debtors who become bankrupt, become so involuntarily.

amount of one thousand dollars or over, may be involuntary bankrupts;¹¹ but to become a voluntary bankrupt it is not necessary that a large amount be owing or that the liabilities of the debtor exceed his assets; all that is required, in that case, is that debts are owing. A corporation, however, cannot be a voluntary bankrupt;¹² nor can anyone go through voluntary bankruptcy oftener than once in six years.¹³

§ 257. **Bankruptcy Procedure.** The United States Courts¹⁴ have jurisdiction of bankruptcy proceedings. The debtor petitioning for the benefit of the bankruptcy law must file a complete list of his debts; if any are omitted he is not discharged therefrom unless the creditor had notice or actual knowledge of the proceedings.¹⁵ It likewise is the duty of the bankrupt to make a schedule of his property, showing its amount, location and value. The creditors have a right to elect a trustee or three trustees¹⁶ to take possession of the assets, if any above the exemptions of the debtor, and to convert such assets into money,¹⁷ paying the debts *pro rata* from the proceeds.

§ 258. **Bankruptcy—Effect on Debts.** After the proceedings are ended and the bankrupt is discharged by the court, he is released fully and forever¹⁸ from the debts

11. Nat'l Bankr. Act of 1898, § 4, b, as amended February 5, 1903.

12. Nat'l Bankr. Act of 1898, § 4, a.

13. Nat'l Bankr. Act of 1898, § 14, b, as amended February 5, 1903.

14. Nat'l Bankr. Act of 1898, § 2.

15. Nat'l Bankr. Act of 1898, § 17 as amended February 5, 1903.

16. Nat'l Bankr. Act of 1898, § 44.

17. Nat'l Bankr. Act of 1898, § 47, a.

18. 2 Blacks. Comm. 483. The theory of the bankruptcy law is that, without it, a debtor come insolvent would find it almost impossible to extricate himself from his difficulties, as any creditor could take any property not exempt, as soon as acquired by the debtor; the creditors are placed on an equal footing and no advantage can be gained by one creditor first seizing all of the property of the debtor, possibly resulting in one claim being paid in full to the entire ex-

scheduled by him, unless he afterwards voluntarily promises to pay them; and this is so although ultimately he may become wealthy. Some debts are not affected by bankruptcy; such as taxes, debts created by fraud or embezzlement, liability for wilful and malicious injuries to persons or to property, and alimony.¹⁹

Preferences given by the debtor during the four months immediately preceding his going into bankruptcy, for the purpose of securing a pre-existing indebtedness, become invalid;²⁰ but a lien given in good faith for an indebtedness created at the same time the lien was given, remains valid. To illustrate: if A., owing X. a sum of money, later and without any prior agreement to do so, should give X. a chattel mortgage in good faith to secure the debt, and A. goes into bankruptcy within four months after the mortgage is recorded, X. could not enforce his mortgage, the theory being that it would be inequitable and contrary to the spirit of the bankruptcy law to allow one originally unsecured creditor to be paid in full while others are not, merely because that one was given an advantage during the period the debtor was becoming insolvent; but some limit must be fixed for inquiring into and setting aside past transactions and Congress arbitrarily has designated four months as being reasonable. However, if a person selling goods on credit to an insolvent person, in good faith should take security, such as a chattel mortgage, at the time the sale is made, to secure the unpaid purchase price, such security can be retained regardless of the fact that the debtor becomes bankrupt immediately afterwards; the theory being that the other creditors are not injured, the seller having added to the estate of the bankrupt an amount equal in

clusion of other creditors from participating in the assets. However there are many good arguments against the bankruptcy law.

19. Nat'l Bankr. Act of 1898, § 17, as amended February 5, 1903.

20. Nat'l Bankr. Act of 1898, § 60, *s.*, as amended February 5, 1903.

value to his claim, which he would not have done unless he had been given the security. If a creditor, having been given a preference which ordinarily could be set aside, thereafter in good faith gives the debtor further credit without security, the creditor will be protected to the extent of the additional credit given not exceeding the amount of the security received by him.²¹ Thus if A., owing X. \$500 on an open account, should give a chattel mortgage to secure it, and then X. should sell A. \$300 worth of goods on credit, and A. goes into bankruptcy within four months after the mortgage was recorded, X. would be protected in full to the extent of \$300 but would have to share with the other creditors as to the remainder of his claim. Any payment received by an unsecured creditor within four months prior to the bankruptcy proceedings must be returned, unless the creditor, at the time he received it, was not aware of the insolvency of the debtor.

§ 259. Bankruptcy Laws Distinguished from Insolvency Laws. Insolvency and bankruptcy laws are similar in this—each aims to give relief to insolvent debtors. Originally there was considerable distinction between bankruptcy and insolvency; but, from what has been said, it will be seen that, in modern times, the distinction between an insolvency law and a bankruptcy law is that under a bankruptcy law the debtor is freed absolutely from certain debts, while under an insolvency law his freedom is temporary, his future acquisitions of property being liable for his former debts.

§ 260. Involuntary Transfers to Sovereign State. The methods so far discussed by which property is transferred involuntarily, relate chiefly to transfers between individuals; but there are several other methods by which a state can compel a transfer of property by preroga-

21. Nat'l Bankr. Act of 1898, § 60, a.

tive,¹ the most common of these being taxation, eminent domain, and police power.

§ 261. **Taxation—Definition—Power to Tax.** A Tax is a burden or charge imposed by the state upon persons or property to raise money for the support of the government. Taxation is the act of imposing this burden or charge,² and is a legislative function solely.³ The power of taxation is an inherent attribute of sovereignty, being possessed by the government without expressly being conferred by the people, because the government cannot exist nor perform its functions without it;⁴ but it must be for a public purpose.⁵

§ 262. **Taxation—Kinds.** A Tax may be direct or indirect.⁶ A Direct tax is one assessed upon the property, person, business, income, etc., of those who pay it;⁷ while an Indirect tax is one whose amount is added to the price of the property by the one who has paid it directly to the government, so that the ultimate purchaser bears the burden. Customs duties and internal revenue taxes are indirect.⁸ Customs duties are those levied upon imports and exports.

§ 263. **Taxation—Subjects of.** All the subjects of a state are liable to taxation;⁹ and, in the absence of express constitutional limitation, personal property of all

1. 2 Blacks. Comm., 408.

2. *Louisiana Co. v. Madere*, 124 La. 635; *State v. Thorne*, 112 Wis. 81, 55 L. R. A. 956.

3. 1 Cooley, Tax'n (3d ed.) 7.

4. *People v. Reardon*, 184 N. Y. 431, 112 Am. St. 628, 8 L. R. A. N. S. 314; 1 Cooley, Tax'n (3d ed.) 8.

5. 1 Cooley, Tax'n (3d ed.) 84.

6. *South Co. v. Morrow*, 87 Tenn. 406; *Pollock v. Farmers' Co.*, 158 U. S. 601, 39 L. ed. 1108. States generally impose direct taxes, and the United States, indirect. 1 Cooley, Tax'n (3d ed.) 11.

7. 1 Cooley, Tax'n (3d ed.) 10.

8. *Lamonde v. Lavergne*, 3 Quebec Q. B. 303.

9. *Union Co. v. Kentucky*, 199 U. S. 194, 203, 50 L. ed. 150.

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kinds ¹⁰ is taxable. Taxation may be carried even to the extent of exhaustion and destruction.¹¹

The general rule is that personal property, although intangible,¹² has its situs for the purpose of taxation at the domicile of its owner,¹³ the maxim being *mobilia sequuntur personam* (Latin, movables follow the person.) Hence a chose in action, such as a promissory note,¹⁴ is taxable at the domicile of its owner ¹⁵ although the debtor resides out of the state,¹⁶ or it is secured by a mortgage on lands outside of the state,¹⁷ or is kept at

10. *Joiner v. Adams*, 114 Ga. 389; *Leon Co v. Leon B'd*, 86 Iowa, 127, 41 Am. St. 486, 17 L. R. A. 199; *Wolfe v. Beckett*, 127 Ky. 252, 32 Ky. Law Rep. 167, 17 L. R. A. N. S. 688. Ships are taxable. *National Co. v. State*, 99 Ala. 462; *Oteri v. Parker*, 93 La. (42 La. Ann.) 374, 7 So. 570; *Gunther v. Baltimore*, 55 Md. 457; *New Eng. Co. v. Com.* 195 Mass. 385; *People v. New Y. Comm'rs*, 58 N. Y. 242; *State Cas.* 79 U. S. 204, 20 L. ed. 370; *Matter of Hatt*, 7 Can. L. J. 103. Intangible property is taxable. *State v. Western Co.*, 96 Minn. 13; *State v. Savage*, 65 Nebr. 714; *People v. Roberts*, 159 N. Y. 70, 45 L. R. A. 126; *Adams Co. v. Ohio*, 166 U. S. 185, 41 L. ed. 965.

11. 1 Cooley, Tax'n (3d ed.) 9.

12. *Hunt v. Turner*, 54 Fla. 654; *Buck v. Miller*, 147 Ind. 586; *Oliver v. Washington Mills*, 93 Mass. 268; *Gallatin v. Beattie*, 3 Mont. 173; *State v. Vansyckle*, 49 N. J. L. 366; *North Car. Co. v. Comm'rs*, 91 N. Car. 454; *Grant v. Jones*, 39 Ohio St. 506; *Small's Est.* 151 Pa. St. 1; *Bullock v. Guilford*, 59 Vt. 516; *Ohio Ass'n v. Court*, 42 W. Va. 318.

13. 1 Cooley, Tax'n (3d ed.) 86.

14. *Collins v. Miller*, 43 Ga. 336.

15. *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729; *Dykes v. Lockwood Co.*, 2 Kans. App. 217; *Hastings' Ex'rs v. Lexington*, (Ky.) 43 S. W. 415; *State v. Earl*, 1 Nev. 394; *State v. Bank of Richmond*, 79 Va. 118.

16. *Pacific Soc. v. San Francisco*, 133 Cal. 14; *Augusta v. Dunbar*, 50 Ga. 387; *Scupp v. Board*, 183 Ill. 278; *Home Co. v. Board*, 99 La. (48 La. Ann.) 451; *Howell v. Gordon*, (Mich.) 86 N. W. 1042; *People v. Campbell*, 138 N. Y. 543; *Hayne v. Delliesseline*, 3 McCord, 374; *Bonaparte v. Court*, 104 U. S. 592.

17. *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 426, 100 U. S. 491; *Baltimore v. Baltimore Co.*, 57 Md. 31; *South Co. v. Morrow*, 85 Tenn. 406; *State v. Gaylord*, 73 Wis. 316.

some other place.¹⁸ On the other hand, as a debt does not belong to the debtor but to the creditor,¹⁹ if the debtor is a resident and the creditor a non-resident, the debt cannot be subjected to taxation within the state,²⁰ even though secured by a mortgage on property within the state.²¹

Tangible property may be taxed where located²² irrespective of the residence of the owner,²³ even though it

18. *Hunter v. Supervisors*, 33 Iowa, 376; *Lanesborough v. Berkshire County*, 131 Mass. 424; *State v. Howard*, 69 Mo. 454 (bonds); *Johnson v. Oregon C'y*, 2 Oreg. 327, 3 Oreg. 13; *Ferris v. Kimble*, 75 Tex. 476. *Contra*: *Wolcox v. Ellis*, 14 Kans. 588, 19 Am. Rep. 107.

19. 1 Cooley, *Tax'n* (3d ed.) 26; *Herron v. Keeran*, 59 Ind. 476, 26 Am. Rep. 87; *Babcock v. Cass*, 65 Iowa, 110; *Com. v. Hays*, 47 Ky. 1; *Barber Co. v. New Orleans*, 92 La. (41 La. Ann.) 1015; *People v. New York*, 58 N. Y. 242; *Worthington v. Sebastian*, 25 Ohio St. 10 (bonds of a foreign corporation); *Hayne v. Delleesseline*, 3 McCord, 374; *Cleveland Co. v. Penn.* 82 U. S. 300, 21 L. ed. 179.

20. *Liverpool Co. v. Board*, 95 La. (44 La. Ann.) 760; *Graham v. St. Joseph*, 67 Mich. 652; *Com. v. Lehigh Co.*, 136 Pa. St. 235.

A judgment is taxable at the domicile of the creditor and not where it is docketed. *Barber v. Farr*, 54 Iowa, 57; *Meyer v. Pleasant*, 92 La. (41 La. Ann.) 645.

21. *Terry v. Delinquent List*, (Aris.) 24 Pac. 182; *Mackey v. San Francisco*, 113 Cal. 392; *Goldgart v. People*, 106 Ill. 25; *Buck v. Miller*, 147 Ind. 589; *Latrole v. Baltimore*, 19 Md. 13; *State v. Scottish Co.*, 76 Minn. 155; *State v. Smith*, 68 Miss. 79; *Holland v. Comm'rs*, 15 Mont. 460; *King v. Manning*, 40 N. J. L. 461; *Myers v. Seaberger*, 45 Ohio St. 23; *South Co. v. Morrow*, 37 Tenn. 406; *State Tax*, 32 U. S. 300.

22. 1 Cooley, *Tax'n* (3d ed.) 24.

23. *Trammel v. Connor*, 91 Ala. 398; *Oakland v. Whipple*, 39 Cal. 112; *Ames v. People*, 26 Colo. 83; *Padelford v. Mayor*, 14 Ga. 438; *Merchants' Co. v. Des Moines*, 128 Iowa, 732, 2 L. R. A. N. S. 662; *Lexington v. Fishback's Trustees*, (Ky.) 60 S. W. 727; *Desmond v. Machias*, 48 Me. 478; *State v. Dalrymple*, 70 Md. 294; *Mitchell v. Lake*, 126 Mich. 367; *Harrison v. Vicksburg*, 11 Miss. 581; *Curtis v. Ward*, 58 Mo. 295; *State v. Shaw*, 21 Nev. 222; *Boardman v. Tompkins*, 85 N. Y. 359; *Hall v. Fayetteville*, 115 N. Car. 281; *Minneapolis Co. v. Traill County*, 9 N. Dak. 213; *Grant v. Jones*, 39 Ohio St. 506; *Shriver v. Pittsburg*, 66 Pa. St. 446; *State v. Council*, 2 Speers, 623; *Holcomb v. Keliher*, 5 S. Dak. 438; *Union B'k v. State*, 17 Tenn. 489; *Hardesty v. Fleming*, 57 Tex. 395; *Union Co. v. State*, 18 Utah. 378, 177 U. S. 149; *Torrey v. Shawano*, 79 Wis. 152. Such as saw-logs; *Burlington*

is taxed at his domicile also;²⁴ and, by statute, intangible property may be made taxable where it may be regarded as actually located.²⁵ Thus, shares of stock in a foreign corporation may be taxed at the domicile of their owner within the state although the corporation is taxed in its own state,²⁶ and although the certificates representing the stock may be in another state.²⁷

Unless permitted by Congress,²⁸ a state cannot tax bonds or other obligations issued by the United States, franchises granted by the United States to corporations,²⁹ nor the means or agencies of the federal government;³⁰ nor, on the other hand, can the federal government tax the means or agencies of the states.³¹ Exemptions from taxation are construed strictly.³²

§ 264. **Eminent Domain.** Eminent Domain is the right of a state, or of those to whom the power lawfully

Co. v. Willetts, 118 Ill. 559; *staves*; *Brown v. Standard Co.*, 103 Ind. 302; and *ice*. *John Hancock Co. v. Rose*, 67 N. J. L. 86.

24. *Shaw v. Hartford*, 56 Conn. 351; *Griggsby Co. v. Freeman*, 108 La. 435, 58 L. R. A. 349; *Leonard v. New Bedford*, 82 Mass. 292; *Collins' v. Green*, 10 Okla. 244; *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. 904, 39 L. R. A. 594. As in the case of cattle; *Hudson v. Miller*, 10 Kans. App. 532; *ice*; *Winkley v. Newton*, 67 N. H. 80; 35 L. R. A. 756; and *logs*. *Coe v. Errol*, 62 N. H. 303, *aff'd* 116 U. S. 517, 29 L. ed. 715.

25. 1 *Cooley, Tax'n* (3d ed.) 658.

26. *State v. Kidd*, 125 Ala. 413; *Greenleaf v. Board*, 184 Ill. 226; *Henkle v. Keota*, 68 Iowa, 334; *Newport v. Ringo's Ex'x*, 87 Ky. 635; *Bacon v. State*, (Mich.) 85 N. W. 307; *Ogden v. St. Joseph*, 90 Mo. 522; *Newark B'k v. Assessor*, 30 N. J. L. 13; *People v. Reardon*, 184 N. Y. 431, 112 Am. St. 628, 8 L. R. A. N. S. 314; *North Co. v. Comm'rs*, 91 N. Car. 454; *McKeen v. Northampton Co.*, 49 Pa. St. 519; *Bradley v. Bauder*, 36 Ohio St. 28.

27. *Stanford v. San Francisco*, 131 Cal. 34.

28. *Crowder v. Riggs*, 153 Ind. 158; *Patton v. Commercial B'k*, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

29. *San Francisco v. Western Co.*, 96 Cal. 140, 17 L. R. A. 301; *Western Co. v. Lakin*, 53 Wash. 326; *Cal. v. Central Co.*, 127 U. S. 1, 32 L. ed. 150.

30. 1 *Cooley, Tax'n* (3d ed.) 130.

31. 1 *Cooley, Tax'n* (3d ed.) 133.

32. *Stinson Lib. v. Board*, 248 Ill. 590.

has been delegated by a state, to condemn and to appropriate the ownership of private property for public use. While eminent domain resembles taxation in that each is a compulsory transfer by an exercise of the sovereign power for the benefit of the public,³³ there are some distinctions³⁴ between them. Taxation is apportioned; eminent domain may be exercised against one person. Taxation is general; eminent domain is for some special purpose. Taxation usually³⁵ calls for the payment of money; eminent domain demands particular property. Taxation does not give any property in return; eminent domain gives compensation.

All kinds of property and every variety and degree of interest therein may be taken under the power of eminent domain;³⁶ and while it most often is exercised in acquiring real property it is not restricted thereto, but personal property,³⁷ including choses in action,³⁸ can be taken thereunder. Eminent domain cannot be exercised for a private purpose;³⁹ and it is indispensable that just compensation be made⁴⁰ in money⁴¹ the amount to be determined by a proper proceeding if it cannot be adjusted by the parties.

§ 265. Police Power—Nature. Police Power is a very comprehensive term; and for that reason is one of

33. *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Re Meador*, 1 Abb. 317, 16 Fed. Cas. No. 9, 375.

34. *Moog v. Randolph*, 77 Ala. 597; *Palmer v. Way*, 6 Colo. 106.

35. 1 *Cooley, Tax'n* (3d ed.) 15.

36. 2 *Lewis, Em. Dom.* (3d ed.) 742, § 411.

37. *Dunlap v. Toledo Co.*, 50 Mich. 470; *Homochitto v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Christy v. St. Louis*, 20 Mo. 143, 61 Am. Dec. 598; *Southern Co. v. Oklahoma C'y*, 12 Okla. 82.

38. *Morris Co. v. Townsend*, 24 Barb. 653. *As shares of stock.* *New Y. Co. v. Offield*, 78 Conn. 1, 77 Conn. 417, *aff'd*, *Offield v. New Y. Co.*, 203 U. S. 372; *Grigg v. Northern Co.*, 67 N. H. 452; *Black v. Delaware Co.*, 24 N. J. Eq. 455.

39. 1 *Lewis, Em. Dom.* (3d ed.) 494, § 250.

40. 2 *Lewis, Em. Dom.* (3d ed.) 1153, § 672.

41. 2 *Lewis, Em. Dom.* (3d ed.) 1172, § 682.

the legal expressions very difficult of definition. It may be designated, in a general way, as the inherent and plenary power of a state to make such laws and ordinances as may be necessary and proper to enforce order, to promote the public health, security, comfort and morality, and to prevent, to detect and to punish injustice and crime. It secures the public welfare by compulsion and by restraint in the use of liberty and property. It is much more comprehensive than the taxing power or the power of eminent domain.¹

§ 266. **Police Power—Fees.** The subject will not be considered here any further than its effect upon the ownership of personal property. Exercise of the police power may affect property in three ways; it may regulate its use, to which reference already has been made; it may destroy it, which will be considered later; or, in a few instances, it may result in a transfer of ownership involuntarily, as by the exaction of fees for certain benefits, as license-fees, and by fines and forfeitures. Water rates are not taxes,² not being for governmental purposes; but are merely the price of a commodity³ furnished. These charges sometimes are designated as "taxes" though they are not such in the true sense. A "dog-tax" is not a tax but a license-fee.⁴ License fees are not imposed for the purpose of raising revenue but for the proper regulation of matters deemed essential to the public safety, health, or welfare.

1. Freund, Pol. Pow. 2, § 2.

2. *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519; *Preston v. Detroit*, 117 Mich. 589; *St. Louis Ass'n v. St. Louis*, 140 Mo. 419; *Silkman v. Yonkers*, 152 N. Y. 327, 37 L. R. A. 827; *Alter v. Cincinnati*, 56 Ohio St. 47, 35 L. R. A. 737.

3. 1 *Cooley, Tax'n* (3d ed.) 5; *Vreeland v. Jersey C'y*, 43 N. J. L. 135, 37 N. J. Eq. 574.

4. *State v. Sharp*, 169 Ind. 128; *Van Horn v. People*, 46 Mich. 183, 41 Am. Rep. 159; *Holst v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *Ex parte Cooper*, 3 Tex. App. 489, 30 Am. Dec.

§ 267. Police Power—Fines—Qui Tam Actions. A Fine is a pecuniary punishment⁵ for unlawful acts, imposed after proper proceedings in a lawful tribunal, and may be coupled with imprisonment. By sentence the defendant becomes a debtor to the state for the amount of the fine.

Sometimes, for the purpose of inducing persons to give information against offenders, the informer, by statute, is given a part of the penalty.⁶ Such actions are called "qui tam"⁷ actions as the informer brings the action in his own name,⁸ describing himself as suing *as well* for the state as for himself. The title of the informer to a part of the penalty depends on his ultimate recovery⁹ in the suit instituted by him; though by commencing an action in good faith he acquires a right which cannot be divested by a subsequent suit by another although reduced to judgment first.¹⁰

§ 268. Police Power—Forfeitures. A Forfeiture is a deprivation of particular property as a penalty for the non-observance of legal duties or for the non-performance of conditions. Under the old common law forfeiture was a very common punishment for the commission

5. 4 Blacks. Comm., 377.

6. State v. Oriol, 100 La. (49 La. Ann.) 442; State v. Wabash Co., 89 Mo. 562; State v. Maulsby, 139 N. Car. 583.

7. From the Latin words meaning, who as well, used in the beginning of the declaration when the pleadings were written in that language.

8. U. S. v. Morris, 2 Bond, 27. A person affixing the word "patent" to an unpatented article for the purpose of deceiving the public, is liable to a penalty, half of which goes to the person who shall sue for the same, the other half being for the use of the United States. U. S. Rev. St. § 4901; Pentlarge v. Kirby, 19 Fed. 501; Walker, Pat. (4th ed.) 287, § 324.

9. 2 Blacks. Comm., 437; Com. v. Welch, 32 Ky. 330.

10. State v. Smith, 64 Me. 423; Dozier v. Williams, 47 Miss. 605; Pike v. Madbury, 12 N. H. 262; Beadleston v. Sprague, 6 Johns. 191.

of crime,¹¹ frequently all¹² of the chattels of a convicted person being confiscated. The right to hold property was regarded as one of the civil rights conferred upon individuals by society; hence when a person violated his duties to society the theory was that he lost all the rights conferred, including the right to hold property.¹³

In modern times, however, forfeitures are less frequent, being said to be "odious," that is, not favored by the law,¹⁴ and courts are prompt in seizing upon any circumstance to prevent one.¹⁵ Under the Federal Constitution,¹⁶ "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." In these days forfeited property usually is directly or indirectly connected with the wrongful act¹⁷ for which the forfeiture is a part of the punishment.

Civil Death¹⁸ is an extinguishment of civil rights; that is to say, a person, though living, is, for some purposes,¹⁹

11. 2 Blacks. Comm. 420. Forfeiture of chattels commences from the time of conviction and not, as in forfeitures of real property, from the time of committing the act for which the forfeiture is a penalty. 2 Blacks. Comm. 421.

12. 4 Blacks. Comm., 285. This punishment, however, was not as severe as it might seem, as personal property was of very few kinds and very limited in quantity.

13. 1 Blacks. Comm. 299.

14. *Jones Co. v. Crary*, 234 Ill. 26; *Est. of Kuhn*, 125 Iowa, 449; *Symonds v. Jones*, 82 Me. 302, 17 Am. St. 485, § L. R. A. 570; *First B'k v. Scott*, 36 Nebr. 607, *Van Zile, Illus. Cas. on Personality*, 90; *Phenix Co. v. Omaha Co.*, 41 Nebr. 834, 25 L. R. A. 679.

15. *Insurance Co. v. Eggleston*, 96 U. S. 572.

16. U. S. Const., Art. III, Sec. III, par. 2.

17. *People v. Kent*, 6 Cal. 89; *Smith v. Maryland*, 59 U. S. 71. Property smuggled into the country may be seized by the government. U. S. Rev. St. § 3066.

18. This term sometimes is designated by its Latin equivalent *civilitate mortuus*.

19. A person civilly dead could not bring an action; *Cannon v. Windsor*, 1 Houst. 144; but conviction and sentence to death in another state does not affect the right to sue. *Wilson v. King*, 59 Ark. 32, 23 L. R. A. 802. The estate of a person civilly dead passes as it

treated as dead. This condition under the common law of England²⁰ was a part of the penalty attaching to the commission of certain crimes; and civil death is recognized to a slight extent in some states in this country.²¹

Forfeitures, however, are not necessarily connected with crimes. Franchises²² of corporations may be forfeited in some cases; and shares of stock owned by a stockholder may be forfeited to a corporation for non-payment of calls.²³ Contracts sometimes provided for a forfeiture in event of non-performance by one of the parties thereto. Leases may be forfeited on account of the commission of waste by the tenant; and a violation of the usury laws may result in a loss of all interest and, in some states, of the principal as well.

§ 269. **Capture.** Another method by which property may be transferred involuntarily is by capture; which

would have done in event of his natural death. 1 Blacks. Comm. 133; *Baltimore v. Chester*, 53 Vt. 318, 38 Am. Rep. 677; *Marsh v. Hutchinson*, 2 B. & P. 231. Under Civil Code § 674, a person sentenced to imprisonment for life is civilly dead; and a distributive share from the estate of his father will be treated as if he had died a natural death. He cannot take it. *Est. of Donnelly*, 125 Cal. 417, 73 Am. St. 62.

20. Originally a person was civilly dead when he was banished, or abjured the realm, or, entering a monastery, became a monk professed. *Platner v. Sherwood*, 6 Johns. Ch. 129. Thus where a person was bound in a bond to an abbot and his successors, and afterwards professed himself a monk and later become abbot of the same abbey, in his capacity as abbot he was given an action of debt against his own executors to recover the money due. If a lease was made to a person for the life of another, it was terminated by the latter becoming a monk; for which reason it became customary, in conveyances for life, to specify that the term was for the natural life. 1 Blacks. Comm. 132.

21. *Nerals Est.* 35 Cal. 396, 95 Am. Dec. 111; *Williams v. Shackelford*, 97 Mo. 322; *Avery v. Everatt*, 110 N. Y. 332, 6 Am. St. 368. See, also, *Schmidt v. Northern Ass'n*, 112 Iowa, 41, 51 Cent. Law J. 456.

22. 2 Blacks. Comm. 153; *Los Ang. Co. v. Los Angeles*, 152 Cal. 242; *Ulmer v. Lime Co.*, 98 Me. 579, 66 L. R. A. 387; *Millcreek v. Erie Co.*, 209 Pa. St. 300; *U. S. v. Grundy*, 7 U. S. 337, 2 L. ed. 459.

23. 1 Cook, Corp. (6th ed.) 377, § 121; *Thompson's Suc.*, 97 La. (46 La. Ann.) 1074; *Re South Mount. Co.*, 7 Sawy. 30.

is a taking or seizing of the goods of an enemy,²⁴ a method which evidently can be employed only in time of war. Military Law is that branch relating to the discipline and government of persons employed in the military service. Martial Law is the application of military rule to all persons indiscriminately. All property belonging to an enemy state is subject to capture, without any liability to make satisfaction therefor;²⁵ but in modern times private property on land is exempt from capture²⁶ unless it is of such a character as to be directly useful for belligerent purposes.²⁷

Whether property is enemy property or not, is determined by geographical limits and not by actual ownership; all persons are treated as enemies whose commercial domicile is in the enemy's country; and property within the territory of the enemy is, in law, subject to capture.²⁸ In providing for the needs of an army in a foreign country, it makes little difference whether the supplies taken are owned by persons owing allegiance to the enemy or to a neutral power; but where provisions are in course of transportation, and the neutral character of their owner is apparent, only extreme necessity can warrant their seizure.²⁹ A distinction is made between captures on land and captures at sea. Vessels belonging to private citizens of the country against which war has been declared, may be seized and disposed of under proper proceedings in an admiralty court;³⁰ and the

24. Kinney, Law Dict. 133.

25. 2 Blacks. Comm. 401.

26. Where the horse of a non-combatant was taken in time of war but he afterwards peaceably regained possession, he can retain it, it being his property. *Hawkins v. Nelson*, 40 Ala. 553, 31 Am. Dec. 492.

27. *Planters' B'k v. Union B'k*, 83 U. S. 483.

28. *Young v. U. S.* 97 U. S. 60. The reason is that, if left, it might help to strengthen the adversary upon a reverse of the fortunes of war.

29. Bordwell, War, 212.

30. *Novlon v. Hallett*, 16 Johns. 337.

amount realized from the sale, called "prize-money," is distributed among those participating in the capture.³¹

§1. U. S. Rev. St. § 4631, provides that all prize-money adjudged to captors, shall be distributed in the following proportions: to the commanding officer of the fleet, one-twentieth; to the commanding officer of a division of the fleet, one-fiftieth; to the fleet captain, one-hundreth; to the commander of the vessel, one-tenth if under command of a commanding officer of a fleet, or three-twentieths if acting independently; the residue is distributed among all others doing duty on board, in proportion to their respective rates of pay.

CHAPTER X.

TRANSFER OF PROPERTY BY OPERATION OF LAW.

§ 270. **How Transfer by Operation of Law Occurs.** Transfer of Ownership by Operation of Law may result from the application or working of some principle of the common law,¹ or from the application of some equitable doctrine,² or as the effect of some statute,³ or from the action of a court in regard to property connected with some cause pending therein.⁴ In some instances the transfer occurs without action being taken by the persons affected;⁵ in other cases, while it is the direct result of some action taken by one⁶ or both of the parties, such action was taken for the accomplishment of some other purpose than the transfer of property, sometimes the parties not even being aware that a transfer of property has taken place.⁷ Transfer by operation of law may occur from the denial of a right;⁸ or, while admitting the right, the law may take away the remedy for its inforcement.⁹

Some of the transfers by operation of law which will be considered in this chapter are those resulting from Marriage, Accession, Confusion of Goods, Succession,

1. Such as Accession.
2. Such as Laches.
3. As in the case of Succession.
4. As in the case of transfers to receivers, guardians, conservators, personal representatives, and the like. These transfers usually are temporary.
5. As in the case of Delay or Death.
6. As in the case of Confusion of Goods.
7. As by Marriage.
8. As in the case of Estoppel.
9. As in the case of the Statute of Limitations.

Delay, and Estoppel. There are some other methods which will receive brief mention only, or no mention at all, as they more properly belong to text-books on Contracts or appear in other elementary works, and a full treatment thereof would be out of place here.

§ 271. **Marriage—Effect on Wife's Choses in Possession.** Under the old common law, marriage gave to the husband absolute ownership of all of the chattels personal in the possession¹⁰ of his wife at the time the marriage occurred,¹¹ under the theory that the wife had merged¹² in her husband and they in law had become but one person.¹³ To acquire ownership of the choses in possession of his wife, no action by the husband was required,¹⁴ marriage amounting to an absolute gift¹⁵ to the husband of chattels personal in possession; chattels real, however, did not become his absolutely unless he survived her.¹⁶

Not only did the choses in the possession of the wife at the time of marriage become the absolute property of the husband, but also all tangible personal property acquired by her at any time during marriage.¹⁷ Even her earnings belonged to him.¹⁸ Her choses in possession

10. Schouler, Dom. Rel. 101, § 83.

11. *Jordan v. Jordan*, 52 Me. 320, Smith, Cas. on Law of Persons, 338.

12. *Durham v. Taylor*, 29 Ga. 166, 171.

13. 2 Blacks. Comm. 433.

14. *Durham v. Taylor*, 29 Ga. 166; *Kanoolehua v. Cartwright*, 7 Hawaii, 327; *Jordan v. Jordan*, 52 Me. 320; *Little v. Marsh*, 37 N. Car. 18.

15. *Williford v. Phelan*, 120 Tenn. 589.

16. 2 Blacks. Comm. 434.

17. *Williford v. Phelan*, 120 Tenn. 589. The legal effect of a note payable to the wife is that the husband is payee. *Young v. Ward*, 21 Ill. 223.

18. *Lemore v. Pinkston*, 31 Ala. 266, 68 Am. Dec. 167; *Hinman v. Parkis*, 33 Conn. 188; *Brown v. Becket*, 6 D. C. 253; *Wood v. Wilson Co.*, 76 Ga. 104; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Knippenberg v. Morris*, 80 Ind. 540; *Duncan v. Roselle*, 15 Iowa, 501;

became his so absolutely that the wife could not dispose of them by will,¹⁹ they passing at his death with the rest of his personal property,²⁰ with the exception of her necessary clothing and ornaments suitable to her rank, known as her paraphernalia, which, although they belonged to her husband²¹ during his lifetime, she might retain after his death as against his personal representatives and all other persons excepting his creditors, the latter, in event of a deficiency of assets, being permitted to take the jewelry; but even in that case the law kindly allowed the wife to retain her necessary clothing,²² thinking, perhaps, it might be more useful to her in cold weather than to the creditors.

§ 272. Marriage—Effect on Wife's Choses in Action. Although the choses in possession of the wife became the absolute property of the husband, it was otherwise as to her choses in action, which marriage transferred to him conditionally only, that is, he was required to reduce her choses in action to possession²³ during her lifetime.²⁴

Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; *McKavlin v. Bresslin*, 72 Mass. 177; *Walker v. Tract Co.*, 156 Mich. 514; *Apple v. Ganong*, 47 Miss. 189; *Hoyt v. White*, 46 N. H. 45; *Cramer v. Reford*, 17 N. J. Eq. 367, 90 Am. Dec. 594; *Filer v. New Y. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Key v. Vasser*, 37 N. Car. 553, 40 Am. Dec. 442; *McDermott's App.*, 106 Pa. St. 358, 51 Am. Rep. 526; *Boozer v. Addison*, 2 Rich. Eq. 273, 46 Am. Dec. 43; *Jones v. Reid*, 12 W. Va. 350, 29 Am. Rep. 453; *Connors v. Connors*, 4 Wis. 112; *Seitz v. Mitchell*, 94 U. S. 530, 24 L. ed. 179; *Brashford v. Buckingham*, Cro. Jac. 77, 205.

19. *Williford v. Phelan*, 120 Tenn. 589.

20. *Puryear v. Puryear*, 16 Ala. 486; *Gaines v. Briggs*, 9 Ark. 46; *Griswold v. Penniman*, 2 Conn. 564; *Washburn v. Hale*, 27 Mass. 429; *Housel v. Housel*, 4 Pa. Law J. Rep. 293, 1 Am. L. J. 387; *Oglander v. Baston*, 1 Vern. Ch. 396, 23 Eng. Reprint, 540.

21. *Farrow v. Farrow* (N. J. 1907), 11 L. R. A. N. S. 889.

22. 2 Blacks. Comm. 435.

23. *Schouler*, Dom. Rel. 103, § 91.

24. *Hayden v. Nutt*, 55 La. (4 La. Ann.) 65. A sufficient reduction to possession resulted from the collection by the husband of a debt due to his wife; *Fitch v. Ayer*, 2 Conn. 143; *Pickett v. Everett*,

If he did not reduce her choses in action to possession in her lifetime and she survived²⁵ him, the ownership thereof became hers²⁶ as before marriage.

§ 273. **Marriage—Effect on Property under Statutes.** The common law rule in regard to the effect of marriage upon the personal property of the wife has been changed in most states by statute²⁷ so that in many of them the property rights of a married man and of a married woman are very nearly the same.

§ 274. **No Dower in Personal Property.** Under the common law a wife did not have any interest in the personal property of her husband, he having the right to dispose of it as he saw fit;²⁸ and in the absence of statute²⁹ a widow is not entitled to dower³⁰ in the personal

11 Mo. 568; *Latourette v. Williams*, 1 Barb. 9; *Ramsdell v. Craighill*, 9 Ohio, 197; *Forrest v. Warrington*, 2 Desauss. Eq. 254; *Rice v. McReynolds*, 76 Tenn. 36; *Carter v. Anderson*, 3 Sim. 370, & L. J. Ch. O. S. 91, 6 Eng. Ch. 370; or from an indorsement of a note payable to her. *Evans v. Secrest*, 3 Ind. 545; *Savage v. King*, 17 Me. 301; *Roberts v. Place*, 18 N. H. 183; *Bayerque v. Haley*, *McAllister*, 97.

25. *Schouler*, Dom. Rel. 102, § 90.

26. *Moody v. Hemphill*, 75 Ala. 268; *Tryon v. Sutton*, 13 Cal. 490; *Tillett v. Com.* 48 Ky. 438; *Pike v. Collins*, 33 Me. 38; *Bohn v. Headley*, 7 Harr. & J. 257; *Hayward v. Hayward*, 37 Mass. 517, *Smith*, Cas. on Law of Persons, 343; *Wade v. Grimes*, 3 Miss. 425; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362; *Dare v. Allen*, 2 N. J. Eq. 415; *Schuyler v. Hoyle*, 5 Johns. Ch. 196; *Curry v. Fulkinson*, 14 Ohio, 100, 75 Am. Dec. 486; *Flory v. Beeker*, 2 Pa. St. 470, 45 Am. Dec. 610; *Gore v. Waters*, 2 Bailey, 477; *Harris v. Taylor*, 35 Tenn. 536, 67 Am. Dec. 576; *Driggs v. Abbott*, 27 Vt. 580, 65 Am. Dec. 214; *Hayes v. Ewell*, 45 Va. (4 Gratt.) 11; *Chappelle v. Olney*, 1 Sawy. 401; *Nash v. Nash*, 2 Madd. 133, 56 Eng. Reprint, 284.

27. *King v. Hooton* (Fla.), 47 So. 394; *Southard v. Plummer*, 36 Me. 64, *Smith*, Cas. on Law of Persons, 517; *Barton v. Barton*, 32 Md. 214, *Smith*, Cas. on Law of Persons, 520; *Ago v. Canner*, 167 Mass. 390, *Smith*, Cas. on Law of Persons, 519; *Williford v. Phelan*, 120 Tenn. 589; *Hipkins v. Estes* (Wash.), 97 Pac. 1087.

28. *Robertson v. Robertson*, 147 Ala. 311, 3 L. R. A. N. S. 774.

29. *Hatcher v. Buford*, 60 Ark. 169, 27 L. R. A. 507, 508; *Gordon v. James*, 86 Miss. 719, 1 L. R. A. N. S. 461

30. *Mulholland v. Thompson*, 12 Ark. 232; *Johns v. Johns*, , Ohio St. 350. There is no dower in severed timber; *Hallett v.*

estate of the husband. In certain cases, however, where the wife would be entitled to dower in land, she is allowed dower in money which represents³¹ the land.

§ 275. **Wife's Equity to a Settlement.** When the common law was in force, if the husband sought the aid of a court of chancery to recover property of his wife, he was required to submit to a suitable settlement for her separate benefit and for the benefit of the children.³² This rule was known as the "wife's equity to a settlement."³³

§ 276. **Liability of Husband for Wife's Debts.** Although the common law gave the personal property of the wife to her husband, it was not always the great benefit to him it might appear to be, for the law transferred to him liability for her unpaid debts incurred before

Hallett, 8 Ind. App. 305; nor in shares of stock in a land company. McDougald v. Hepburn, 5 Fla. 568. See, however, Copeland v. Copeland, 70 Ky. 349, where dower was allowed in stock of a railroad company, as being real estate. Dower is not allowed in leasehold interests. Abbott v. Bosworth, 7 Ohio Dec. Reprint, 300, 2 Cinc. Law Bul. 92, aff'd 36 Ohio St. 605. This is so even though the lease by being renewable forever is perpetual. Oliver v. Jones, 3 Ohio N. P. 129. There is no selsin even in a long term lease; Ware v. Washington, 14 Miss. 737; so that there is no dower in a lease for 999 years. Goodwin v. Goodwin, 33 Conn. 314.

31. The widow is entitled to interest for life on the money which is equivalent to her dower interest in the land. Chaney's Heirs v. Chaney's Adm'r, 38 Ala. 35.

Dower may be had in the purchase-money of land subject to dower, where it has been conveyed free therefrom. Re Hunter, 1 Edw. 1.

The widow is entitled to dower in a fund produced from a sale of land by condemnation. Bonner v. Peterson, 44 Ill. 253.

Where a building is destroyed by fire after the death of the husband and before dower is assigned, the widow is entitled to dower in the insurance money collected by the administrator. Campbell v. Murphy, 55 N. Car. 357.

This is known as "Equitable Conversion." 3 Pomeroy, Eq. Jur. (3d ed.) 2304, § 1159.

32. Schouler, Dom. Rel. 106, § 94.

33. 3 Pomeroy, Eq. Jur. (3d ed.) § 1114; Scott v. Spashett, 3 Mach. & G. 599.

marriage,³⁴ even though he might have been ignorant of their existence. If the wife did not bring him any property, marriage might result very disastrously for him from a financial point of view, and he might even be persuaded that marriage was a failure. The husband was required also to support his wife during coverture; but upon her death the "cover was off" and his liability for debts contracted by her before marriage, was terminated.³⁵ If the wife survived her husband and he had not paid such debts, she became personally liable as before marriage.³⁶

§ 277. **Accession—Kinds.** Accession is the acquisition of title to the increments of property. Sometimes the term is applied to the increments themselves; and, in the latter sense, it may be either natural or artificial. Natural accession usually brings into existence tangible property which did not have prior existence, and this branch of the subject has received attention in a prior chapter. Artificial accession may relate to tangible property or to intangible rights. In the former case it results from human labor either by increasing the value of a product from a change in form, or by a union of materials, or by both. Accession to intangible rights usually results from express or implied agreement, as rents, interest, dividends and the like, the general rule being that such increase belongs to the owner of the *corpus* producing it.

The question of accession to tangible objects may be complicated by various circumstances; as whether it has resulted from the act of the owner of the material or from the act of a third person; whether the act was done innocently or wrongfully; and sometimes a decision of

34. Schouler, Dom. Rel. 79, § 61; *Heard v. Stamford*, 3 P. Wms. 409. This is now changed by statute in most states.

35. Schouler, Dom. Rel. 70, § 61.

36. Schouler, Dom. Rel. 71, § 61.

the question must be governed by the form of the action brought; as whether the owner of the subject-matter sues to recover actual possession of his property or merely brings an action to recover damages for injury thereto.

§ 278. **Accession by Union of Materials.** The general rule is that when materials of one person are united to the materials of another by labor forming a joint product, the owner of the principal materials will acquire the right of property to the whole¹ by accession, especially is this so if the owners of the materials have consented² expressly or impliedly to the union.

1. Thus rule was applied where there were several pieces of iron chain, most of them belonging to one person, and the rest to another, which one of the owners, without the knowledge of the other, caused to be united into one chain; *Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582, *Pattee*, Illus. Cas. in *Personalty*, 99, 1 Gray, Cas. on Prop. 84; and where machinery from one steamboat was placed in another steamer. *Coursin's App.*, 79 Pa. St. 220.

The civil law was as follows: "When a man has created a new form out of materials partly his own and partly another's, for instance when he has compounded mead out of his own wine and another person's honey, or a plaster or eye-salve out of his own drugs and those of other people, or a garment out of wool partly his own and partly another's, in such a case there is no doubt that the maker is the owner; since he has not only given his labor, but provided also a portion of the materials of the article." Inst. ii, 1, § 25 (*Abdy & Walker's transl.*). "The Roman law adjudged, that if one man write anything on the paper or parchment of another, the writing should belong to the owner of the blank materials; meaning thereby the mechanical operation of writing for which it directed the scribe to receive a satisfaction; for in works of genius and invention as in painting on another man's canvas the same law gave the canvas to the painter." 2 Blacks. Comm. 406. See *Simmons Co. v. Walbel*, 1 S. Dak. 488, 36 Am. St. 755, 11 L. R. A. 267.

2. A person supplying sacks for flour will be held to consent that his subsidiary and relatively unimportant contribution to the final product shall become an accession to the contribution of the manufacturer. "For all practical commercial purposes the bag and its contents become inseverable. They are no longer identified as so many barrels of flour and a bag, but they become united in a single entity, a sack of flour. The flour, however, is the principal thing. The sack is but a minor accessory to the flour, and, in com-

§ 279. **Accession from Repairs.** Repairs to an article become a part* of it, belonging to the owner of the article repaired though the labor and materials added greatly exceed its original value.

§ 280. **Accession from Labor by Willful Trespasser.** There are more cases involving the addition of labor alone to the materials of another, than there are in regard to a union of materials belonging to different persons. The general rule is that the owner of an article can recover it from one who willfully and wrongfully has taken and converted it into some other thing, without the wrongdoer being entitled to any recompense for its increased value,⁴ provided the original owner can iden-

parison with it, is of an almost negligible value." *Atchison Co. v. Schriver*, 72 Kans. 550, 4 L. R. A. N. S. 1056. In this case the owner of the sacks was not allowed title to flour shipped by a railroad, as against the owner of the flour.

A box containing a corpse is incident to it; so that the owner of the box cannot maintain an action against a carrier for refusing to carry the corpse if a contract between the carrier and himself to carry the corpse or to carry the box without the corpse, is not proved. *Driscoll v. Nichols*, 71 Mass. 488.

"It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman." 2 Blacks. Comm. 404.

3. *Coursin's App.*, 79 Pa. St. 220; *Clark v. Wells*, 45 Vt. 4, 12 Am. Rep. 187; *Menetone v. Athawes*, 3 Burr. 1592. Where a wagon delivered for repairs was worth \$90 after the repairs were completed, it continued to be the property of the bailor and could not be levied upon as the property of the bailee although the repairs amounted to \$78.50. *Gregory v. Stryker*, 2 Den. 628, *Pattee, Illus. Cas. in Personalty*, 104, *Lawson, Cas. on Pers. Prop.* 207. A mortgage of a vessel covers new sails replacing old ones; 1 *Cobbey, Chat. Mort.* 463, § 352; *Southworth v. Isham*, 3 Sandf. 448; *The Canada*, 17 Fed. 248; and a mortgage of the rolling-stock of a railroad covers repairs and betterments thereto. 1 *Cobbey, Chat. Mort.* 464, § 352; *Hamlin v. Jerrard*, 72 Me. 62; *Ex parte Ames*, 1 Lowell, 561.

4. *Clement v. Duffy*, 54 Iowa, 632; *Pierce v. Goddard*, 39 Mass. 559, 33 Am. Dec. 764; *Furnace Co. v. Tie Co.*, 153 Mo. App. 442; *Worth v. Northam*, 26 N. Car. 102; *Weymouth v. Chicago Co.*, 17 Wis. 550, 84 Am. Dec. 763.

tify⁵ the property in its changed form as having been made from his materials.⁶ An innocent purchaser from a trespasser in such a case does not acquire any better title⁷ than the trespasser; though even a wrongdoer, who by labor has increased the value of property, has a right to it as against another wrongdoer appropriating it.⁸

§ 281. **Accession from Labor by Innocent Person.** The above rule that the owner of property can recover it from a wrongdoer applies also to property taken innocently under a mistake as to ownership, the owner being allowed to recover it;¹ but it is otherwise if its iden-

Where corn is taken without authority and made into whisky, creditors of the owner of the corn can seize it. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

5. *Carpenter v. Lingenfelter*, 42 Nebr. 728, 32 L. R. A. 422.

6. The most of the cases upon this point relate to timber. The owner of standing trees can recover articles made therefrom, whether logs; *Nesbitt v. St. Paul Co.*, 21 Minn. 491; *Betts v. Lea*, 5 Johns. 348, 4 Am. Dec. 368, *Pattee, Illus. Cas. in Personality*, 113; cordwood; *Brock v. Smith*, 14 Ark. 481; *Isle Co. v. Hertin*, 37 Mich. 432, 26 Am. Rep. 520, *Pattee, Illus. Cas. in Personality*, 107; rails, posts; *Snyder v. Vaux*, 2 Rawle, 423, 21 Am. Dec. 466; boards; *Davis v. Easley*, 13 Ill. 192; *Brown v. Sax*, 7 Cow. 95; ties; *Stotts v. Brookfield*, 55 Ark. 307; *Strubbee v. Cincinnati Co.*, 78 Ky. 481, 1 Ky. Law Rep. 25, 39 Am. Rep. 251; staves; *Heard v. James*, 49 Miss. 236; *Stave Co. v. Pickering (Tex. Civ. App.)*, 119 S. W. 333; shingles; *Chandler v. Edson*, 9 Johns. 362; or coal. *Curtis v. Groat*, 6 Johns. 168, 4 N. Y. Com. Law, 88, 5 Am. Dec. 204.

7. *McKinnis v. Little Co.*, 44 Ark. 210; *Strubbee v. Cincinnati Co.*, 78 Ky. 481, 1 Ky. Law Rep. 25, 39 Am. Rep. 251; *Freeman v. Underwood*, 66 Me. 229; *Nesbitt v. St. Paul Co.*, 21 Minn. 491; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Missouri Co. v. Starr*, 22 Tex. Civ. App. 353.

8. *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 350, *Pattee, Illus. Cas. in Personality*, 75, *Lawson, Cas. on Pers. Prop.* 174. This case relates to manure on a public highway, which had been gathered into heaps.

1. *Riddle v. Driver*, 12 Ala. 590; *Davis v. Easley*, 13 Ill. 192; *Ricketts v. Dorrel*, 55 Ind. 470; *Eaton v. Monroe*, 52 Me. 63; *Harding v. Coburn*, 53 Mass. 333, 46 Am. Dec. 680; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Stave Co. v. Pickering (Tex. Civ. App.)*, 119 S. W. 333.

tity³ has been destroyed, or its increased value is out of all proportion³ to its original value. Increase in the value of mortgaged property as the result of labor accrues to the mortgagee,⁴ and the question of fraud is not involved.⁵

§ 282. Accession by Mistake—Actions for Damage.
The original owner by merely suing for damages for

2. In *Lampton's Ex'rs v. Prestons' Ex'rs*, 24 Ky. 454, clay made into unburned bricks was regarded as unchanged in identity; but it was held otherwise as to burned bricks, the owner of the clay not being allowed to recover the latter.

"By the Roman law, if any given corporeal substance received afterwards an accession * * * by artificial means, as * * * the embroidering of cloth or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted." 2 Black. Comm. 404.

3. *Lewis v. Courtwright*, 77 Iowa, 190; *Strubbee v. Cincinnati Co.*, 78 Ky. 481, 1 Ky. Law Rep. 25, 39 Am. Rep. 251. Where trees originally worth but \$25 were converted by one in good faith into barrel hoops worth \$700, the original owner was not allowed to recover the hoops. Otherwise "it visits the involuntary wrongdoer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained." *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653, *Pattee, Illus. Cas. in Personality*, 114, 1 Gray, *Cas. on Prop.* 85, *Lawson, Cas. on Pers. Prop.* 216. The remedy of the owner is an action for damages for trespass, not replevin.

4. 1 *Cobbey, Chat. Mort.* 462, § 352. A mortgage of leather cut and prepared for the manufacture of shoes, covers the shoes subsequently made. *Putnam v. Cushing*, 76 Mass. 334. A mortgage of logs covers lumber made therefrom; *White v. Browne*, 12 Up. Can. Q. B. 477; and a mortgage of grass covers hay made from such grass. *Smith v. Jenks*, 1 Den. 580.

5. *Gregg v. Sanford*, 24 Ill. 17; *Pulcifer v. Page*, 32 Me. 404; *Sumner v. Hamlet*, 29 Mass. 76; *Perry v. Pettingill*, 33 N. H. 433; *Frost v. Willard*, 9 Barb. 440; *Jenckes v. Goffe*, 1 R. I. 511; *Ex parte Ames*, 1 Lowell, 561; *Woods v. Russell*, 5 B. & Ald. 942.

taking the property, waives his right to reclaim it and cannot recover its enhanced value if the property was taken by mistake.⁶ Thus, where cord-wood, worth \$1.50 a cord in the original pile, was taken by mistake and hauled to another place where it was worth \$4 a cord, the original owner, suing for damages only and not to regain possession of the wood, could recover but \$1.50 a cord.⁷

In some states a different rule prevails. In a similar case where standing trees were converted into cord-wood and hauled to another place, all having been done under an honest mistake, the court allowed the original owner to recover the increased value, and denied the wrongdoer any compensation for his labor. The court said that the original owner might have preferred standing trees and the increased value which would result from growth, or he might have expected to make other use of them; and to allow the wrongdoer to recover for his labor in such a case would be encouragement to carelessness and temptation to false evidence that an intentional trespass was innocent mistake; the wrongdoer would receive remuneration even if his trespass were discovered, and all of the inconvenience would fall upon the innocent owner; whereas the consequences of the mistake should fall upon the person committing the trespass.⁸

§ 283. Accession—Action for Damage from Intentional Wrongdoer. Where damages are sought from a willful wrongdoer the measure of damages is the value of

6. Timber cut in good faith on the land of another is to be paid for at stumpage value and not as lumber. *Ball Co. v. Simms Co.*, 121 La. 627, 18 L. R. A. N. S. 244. Where grass is cut under a *bona fide* claim of title, its value as standing grass and not as hay is recoverable. *Hinman v. Heyderstadt*, 32 Minn. 250, *Pattee*, Illus. Cas. in *Personalty*, 130.

7. *Weymouth v. Chicago Co.*, 17 Wis. 550, 84 Am. Dec. 763.

8. *Isle Co. v. Hertin*, 37 Mich. 332, 36 Am. Rep. 520, *Pattee*, Illus. Cas. in *Personalty*, 107, 1 Gray, Cas. on Prop. 92, *Lawson*, Cas. on Pers. Prop. 210.

the article in its changed state;⁹ and this value can be recovered even from an innocent purchaser¹⁰ from the wrongdoer; but recovery cannot be had for any value added by such innocent purchaser.¹¹ In some states, however, damages cannot be recovered from an innocent purchaser beyond the value of the material as originally taken. In a case where trees were cut down by trespassers, made into cord-wood and ties and sold to a railway company who bought in good faith, the landowner was allowed to recover the value of the timber only as it stood on the ground. "As against the innocent purchaser from the thief, the original owner has the 'title' to his timber, but by virtue of what does he have 'title' to the thief's labor?" "It does not comport with notions of justice and equity that, against those who have done no wrong, these owners should recover three times the value of what they have lost. They never spent one cent of money nor one hour of labor in changing the timber worth one dollar into cord-wood worth three. All this was done by someone else; and why should the owners recover for it? If they are compensated for what they have lost, and all they have lost, they are certainly fully paid."¹²

§ 284. **Confusion of Goods—How Caused.** Confusion is such an intermixture of goods owned by different persons that the property of each no longer is distinguishable.¹ Although Accession and Confusion of Goods are

9. *Franklin Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280.

10. *Nesbitt v. St. Paul Co.*, 21 Minn. 491, *Pattee*, Illus. Cas. in Personalty, 133.

11. *Bolles Co. v. U. S.*, 106 U. S. 432, 27 L. ed. 230.

12. *Railway Co. v. Hutchins*, 32 Ohio St. 571, 1 Gray, Cas. on Prop. 96. See, also, *Single v. Schneider*, 30 Wis. 570, where it is said that there is no difference in the amount of damages recoverable whether the trespass was by mistake or intentional, the measure of damages being the full value of the property less the expense of the defendant down to the time the action was brought.

1. *Ayre v. Hixson*, 53 Oreg. 19; *Trapnell v. Lowellyn*, 37 W. Va. 242, 33 Am. St. 39.

analogous, there are some distinctions between them. Accession is addition to the property of another; confusion is a mixture of the property of two or more. Thus, if trees of A. are made into lumber by B., that is accession to the property of A. by the labor of B.; but if B., taking that lumber, intermingle it with his own so that it becomes uncertain which was the original property of A., that is confusion.

Confusion of goods may result from different causes and under different circumstances, the law in each case depending upon such causes and circumstances. Confusion may be authorized; it may be unintentional; it may be willful and tortious; or it may be accidental, that is, resulting from other than human agency. The goods may be all of one kind or of different kinds; and if all of one kind they may be of equal or of unequal values. Where confusion results from human agency, the person causing it may not have any interest in any part of the goods; or, as is usually the case, he may have owned a portion of them.

§ 285. Confusion of Goods from Tort. The general rule is that where articles of different qualities or values are mixed through the wrongful² act or through the neg-

If the goods of each can be distinguished, there is no confusion. *Alley v. Adams*, 44 Ala. 609; *Capron v. Porter*, 43 Conn. 383; *Claffin v. Continental Wks.*, 85 Ga. 27; *Scott v. Schofield*, 101 Iowa, 15; *Smith v. Sanborn*, 72 Mass. 134; *Shoe Co. v. Sally*, 114 Mo. App. 222; *Moore v. Bowman*, 47 N. H. 494, 1 Gray, Cas. on Prop. 144; *Jewett v. Dringer*, 30 N. J. Eq. 291; *Frost v. Willard*, 9 Barb. 440; *Queen v. Wernwag*, 97 N. Car. 383; *Brown v. Bacon*, 63 Tex. 595; *Holbrook v. Hyde*, 1 Vt. 286; *McKnight v. U. S.*, 130 Fed. 659, 65 C. C. A. 27.

2. *Hart v. Morton*, 44 Ark. 447; *Little Co. v. Little Co.*, 11 Colo. 223, 7 Am. St. 226; *Wright v. Skinner*, 34 Fla. 453; *Thome v. Colton*, 27 Iowa, 425; *Weil v. Silverstone*, 69 Ky. 698; *Osborne v. Cargill Co.*, 62 Minn. 400; *Pratt v. Bryant*, 20 Vt. 333; *Crappier v. Paterson*, 19 Up. Can. Q. B. 160. See, also, *Byrne v. McGrath*, 130 Cal. 316, 80 Am. St. 127; *Treat v. Barber*, 7 Conn. 274; *Huff v. Earl*, 3 Ind. 306; *Williams v. Geiger*, 12 Wash. 42. As in the case of lumber; *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675, 1 Gray, Cas. on

ligence³ of one whose goods are a part of the mass, producing a mass of a third quality or value, and the person whose goods are mixed without his consent cannot tell what the original value of his property was, the latter shall have the whole as a punishment to the person guilty of the wrong.⁴ If the intermingled articles were

Prop. 143; logs; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627, Pattee, Illus. Cas. in Personalty, 148, 1 Gray, Cas. on Prop. 138, Lawson, Cas. on Pers. Prop. 236; grain; *Samson v. Rose*, 65 N. Y. 411; cotton; *Thrash v. Bennett*, 57 Ala. 156, Griffin, Cas. on Pers. Prop. 188; *Alexander v. Ziegler*, 84 Miss. 560; *Hentz v. The Idaho*, 93 U. S. 575, 23 L. ed. 978; old iron; *Jewett v. Dringer*, 30 N. J. Eq. 291, 8 Cent. Law. J. 88, Lawson, Cas. on Pers. Prop. 232; branded cattle; *Johnson v. Hocker* (Tex. Civ. App. 1897), 39 S. W. 406; butter and cheese. *First B'k v. Schween*, 127 Ill. 573, 11 Am. St. 174.

3. *Wells v. Batts*, 112 N. Car. 283, 34 Am. St. 506.

4. *Meeks v. Min. Co.*, 141 Mo. App. 648; *Ayre v. Hixson*, 53 Oreg. 19; *Fellowes v. Mitchell*, 2 Vern. 515. Where plank, boards, scantling and shingles, being the cargo of a schooner, part of the cargo belonging to the owner of the schooner and part to another person, were mixed by the owner of the schooner so that the original ownership could not be distinguished, the owner of the schooner intending to defraud the owner of the other part of the cargo, the owner of the schooner forfeited all of his rights in the cargo, and his creditors were not allowed to levy upon the lumber so intermingled. *Beach v. Schmultz*, 20 Ill. 185, Pattee, Illus. Cas. in Personalty, 145. A third person cannot acquire any greater right than the wrongdoer. *First B'k v. Schween*, 127 Ill. 573, 11 Am. St. 174; *Kreuzer v. Cooney*, 45 Md. 582; *Adams v. Wildes*, 107 Mass. 123; *Rose v. Sharpless*, 74 Va. (33 Gratt.) 153; *Weaver v. Neal*, 61 W. Va. 57, 123 Am. St. 972.

The civil law allowed satisfaction to the wrongdoer. 2 Blacks. Comm. 405.

The rule of forfeiture is applied to infringements. If a person manufacture an article, a part of which infringes a patent, and it cannot be ascertained how much of the profit made by the manufacturer resulted from the portion which did not infringe, the patentee will be allowed the entire profit. *Elizabeth v. New J. Co.*, 97 U. S. 141. Likewise, if goods are sold under a trademark which is an infringement, and it cannot be ascertained with reasonable certainty how much of the profit on such sales resulted from the intrinsic value of the commodity and how much was due to the trademark, the owner of the trademark will take the whole. *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Lynn Co. v. Auburn-Lynn Co.*, 100 Me. 461, 4 L. R. A. N. S. 960.

of equal value, the innocent person will be entitled to possession of the mass; but as the innocent person has not suffered any serious injury and as forfeitures are not favored in law, the wrongdoer will be entitled to his proportion⁵ whenever it is possible to make a fair and equitable division, even though the form of the property has been changed.

§ 286. Confusion of Goods—Accidental—Innocent—Authorized. If the confusion is free from fraud, there is no forfeiture;⁷ and if the goods cannot be distinguished, the original owners become tenants in common of the mass in proportion⁸ to the amounts originally owned by each. This is the rule where the confusion resulted from accident.⁹

5. *Hesseltine v. Stockwell*, 60 Me. 237, 50 Am. Dec. 627. *Pattee, Illus. Cas. in Personalty*, 148, 1 Gray, *Cas. on Prop.* 138, *Lawson, Cas. on Pers. Prop.* 236; *Rochester Co. v. Razy*, 20 N. Y. Supp. 583; *Hents v. The Idaho*, 93 U. S. 575, 23 L. ed. 978; *Tuption v. White*, 15 Ves. 442. As in the case of wheat of the same grade, belonging to different persons, wrongfully mixed by one of them and ground into flour. *First B'k v. Scott*, 36 Nebr. 607, *Van Zille, Illus. Cas. in Personalty*, 90.

7. *Hart v. Morton*, 44 Ark. 447; *Chandler v. De Graff*, 25 Minn. 88; *Pickering v. Moore*, 67 N. H. 533, 534, 68 Am. St. 695, 31 L. R. A. 698, *Van Zille, Illus. Cas. on Personalty*, 85 (manure); *Leonard v. Belknap*, 47 Vt. 602.

8. *Low v. Martin*, 18 Ill. 286; *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501; *Keweenaw Ass'n v. O'Neil*, 120 Mich. 270; *Van Liew v. Van Liew*, 36 N. J. Eq. 637; *Ayre v. Hixson*, 53 Oreg. 19 (sheep); *Brown v. Bacon*, 63 Tex. 595; *Bank v. Peterson*, 33 Utah, 209; *Adams v. Meyers*, 1 Sawy. 306; *Jones v. Moore*, 4 Y. & C. 351. See, also, *Clark v. Springfield*, 36 Ohio St. 643.

9. Where wood belonging to different persons was washed down by a freshet, the property of the original owners becoming indistinguishable, they became tenants in common of the entire lot in proportion to the number of cords each owned before its confusion. *Moore v. Erie Co.*, 7 Lane (7 N. Y. Supr.) 89, *Pattee, Illus. Cas. on Personalty*, 141. Where a vessel was wrecked and a portion only of the bales of cotton on board were saved, but the marks thereon were obliterated, the various owners of the cotton on board became tenants in common in proportion to the amount shipped by each.

Generally there is no forfeiture where confusion is caused by one acting innocently; in which case each owner can retake, without the consent¹⁰ of the other, an amount equal in quantity and quality to that previously owned by him;¹¹ or if necessary an action¹² can be brought for his share. Sometimes, however, even an innocent person will lose his property as the result of confusion. Thus if goods are indistinguishably mixed, though in good faith, with property subject to forfeiture to the government, the courts cannot make any division.¹³

Of course if the confusion was authorized, there is no ground for forfeiture, the original owners likewise becoming tenants in common¹⁴ in proportion to their former interests. This most often occurs in bailments.¹⁵

Spence v. Union Co., L. R. 3 C. P. 427. Where tallow in warehouses is melted and mixed by an accidental fire, the ownership therein is not lost to the extent that it cannot be the subject of larceny. *Buckley v. Gross*, 32 L. J. Q. B. 129, 3 Best & Smith (113 Eng. Com. Law), 566, 7 L. T. 743, 11 Wkly. Rep. 465, 9 Jur. N. S. 986.

10. *Sims v. Glazener*, 14 Ala. 695, 48 Am. Dec. 120.

11. *Gates v. Rifle Co.*, 70 Mich. 309, *Griffin*, Cas. on Pers. Prop. 19, *Van Zile*, Illus. Cas. on Personalty, 87.

12. *Ryder v. Hathaway*, 38 Mass. 298, 1 Gray, Cas. on Prop. 134. Where a person, thinking a contract had been effected for a sale of wood to another, hauled it upon the land of the other and threw it upon wood belonging to the latter, he can recover his property; or, upon refusal of the landowner to allow it to be retaken, such innocent person can recover its value. *Pratt v. Bryant*, 20 Vt. 333, *Pattee*, Illus. Cas. in Personalty, 139, *Lawson*, Cas. on Pers. Prop. 233. *Replevin* can be brought; *Rust Co. v. Isom*, 70 Ark. 99, 91 Am. St. 68; *Blodgett v. Seals*, 78 Miss. 522; or *trover*. *Stall v. Wilbur*, 77 N. Y. 158.

13. *U. S. v. 56 bbls.*, 1 Abb. 92.

14. 2 Blacks. Comm. 405; *Dole v. Olmstead*, 36 Ill. 150, 35 Am. Dec. 397, 41 Ill. 344, 39 Am. Dec. 386; *Nowlen v. Colt* (N. Y.), 6 Hill, 461, 41 Am. Dec. 756; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430.

15. If grain is delivered to a warehouse and, by custom, is mixed with grain of an equal grade, the warehouseman is a bailee, the different depositors becoming tenants in common of the mass in proportion to the amounts in store, even though the entire contents of the elevator may change several times before a particular de-

§ 287. **Confusion of Goods—Mortgages.** Where mortgaged property is confused with other property by the mortgagor without the knowledge of the mortgagee, so that the mortgaged goods cannot be distinguished,¹ whether the result of carelessness² or of intention,³ the lien of the mortgage will attach to the entire lot;⁴ or, if the goods can be distinguished, but the mortgagor refuses to select and take away the goods not covered by the mortgage, and the mortgagee does not know which the mortgaged goods are, he is not a trespasser if he takes the whole stock.⁵ Likewise if mortgaged goods are intermingled with those of a third person with the consent⁶ of the latter, he must identify his goods or lose them. The rule is the same where the confusion was by a purchaser⁷ from the mortgagor. If mortgaged goods are indistinguishably mixed with goods of third persons with the consent of the mortgagee, the lien of

positor reclaims the grain he deposited and it would be impossible to return to him a single grain of the amount originally brought by him. *Woodward v. Seamans*, 125 Ind. 330, 21 Am. St. 225; *Arthur v. Chicago R'y*, 61 Iowa, 648; *Moses v. Teetors*, 64 Kans. 149, 57 L. R. A. 267; *Forbes v. R. R. Co.*, 133 Mass. 154; *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474; *Hall v. Pillsbury*, 43 Minn. 33, 19 Am. St. 209, 7 L. R. A. 529; *Savage v. Salem Co.*, 48 Oreg. 1; *Bretz v. Diehl*, 117 Pa. St. 589, 603; *Milhiser Co. v. Gallego Co.*, 101 Va. 579; *Young v. Miles*, 20 Wis. 615, 23 Wis. 643; *Rahilly v. Wilson*, 3 Dill. 420. Elevator cases are regulated by statute in some states. See, *ante*, § 123, n. 12.

1. 1 *Cobbey, Chat. Mort.* 463, § 352; *Fowler v. Hoffman*, 31 Mich. 215.

2. 2 *Cobbey, Chat. Mort.* 1228, § 992; *Kreuzer v. Cooney*, 45 Md. 582; *Adams v. Wildes*, 107 Mass. 123.

3. *Merchants' B'k v. McLaughlin*, 2 Fed. 133.

4. *Burns v. Campbell*, 71 Ala. 271.

5. *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379, 1 Gray, Cas. on Prop. 141.

6. 2 *Cobbey, Chat. Mort.* 983, § 765; *Kreth v. Rogers*, 101 N. Car. 263.

7. *Fuller v. Paige*, 26 Ill. 358, 79 Am. Dec. 379, 1 Gray, Cas. on Prop. 141; *Willard v. Rice*, 52 Mass. 493, 45 Am. Dec. 226, 1 Gray, Cas. on Prop. 137.

the mortgage is lost,⁸ unless the amount of mortgaged goods intermingled is known⁹ and all of the goods were of the same quality; in which case each person interested in the mass will be entitled to his proportion.¹⁰

§ 288. **Repudiation through Sovereignty.** A sovereign state cannot be sued in its own or in any other courts against its will,¹¹ but it can enforce¹² its rights in court; state contracts being voidable and not invalid.¹³ A state can, and sometimes does,¹⁴ expressly repudiate its obligations; and whenever a state refuses performance of its contracts, it in effect is a transfer of property to the state.

§ 289. **Succession on Death.** Distribution is the division of the personal estate of an intestate among his next of kin after administration, an intestate being one who has died without disposing of all of his property by will; and the state or condition of his affairs in such a case is called intestacy.¹ Upon the death of a person in-

8. *Bidgood v. Monarch Co.*, 9 N. Dak. 627, 81 Am. St. 604.

9. *Harding v. Coburn*, 53 Mass. 333, 46 Am. Dec. 680, *Griffin, Cas. on Pers. Prop.* 165.

10. *Rochester Co. v. Razy*, 20 N. Y. Supp. 583. As in the case of sheep. *Ayre v. Hixson*, 53 Oreg. 19.

11. *Ohio v. Franklin B'k*, 10 Ohio, 91; *Murray v. Wilson Co.*, 29 S. Ct. 458. See, also, *People v. Dennison*, 84 N. Y. 272; *The Hobart*, 2 Dods. 100.

Jurisdiction implies superiority of power; authority to try would be vain and idle without authority to redress; and the sentence of a court would be contemptible unless the court had power to command the execution of it. 1 *Blacks. Comm.* 242.

12. *People v. Johnson*, 14 Ill. 342.

13. *McCann v. Randall*, 147 Mass. 81, 88, 9 Am. St. 666. A draft issued by the government is property and a subject of embezzlement. *State v. Orwig*, 24 Iowa, 102.

14. The *North American Review* of August and December, 1884, estimates that the claims repudiated by the various states amount to \$300,000,000.

1. There may be partial intestacy; as in the case of a will which for some reason does not dispose of all of the property of the testator; and the property not disposed of must be treated as in any other

testate his personal property passes to his next of kin,² to be ascertained at the time of his death, known as distributees. "Descent" is the technical term applied to the devolution of real estate to the heirs of an intestate; though sometimes used to include personal property.³ Strictly speaking, however, there are no heirs to personal estate.⁴

Distribution of personal property among the next of kin is regulated by statute,⁵ and the rules therefor are very similar to those governing the descent of real property. The student should consult the statute of his own state to ascertain among whom personal property is to be distributed after the death of its owner intestate. In modern times we are so accustomed to the method of distribution provided by statute that the average person regards the statutory method as merely affirming a natural right of certain persons to property left by a decedent. However, there is no natural right in such cases; for, in the absence of a statute or custom upon the point, a person at his death would be regarded as having abandoned⁶ his property, and it would belong to the first person taking actual possession. As in most instances the family

case of intestacy. This state of affairs might arise where a will designates a portion only of the property of the testator, either intentionally or a part inadvertently is omitted; or he subsequently may acquire additional property; or a testator may attempt to dispose of all of his property, and some of the legacies may lapse. *Perry v. Logan*, 5 Rich. (5 S. Car. Eq.) 202.

2. *Re Weaver*, 140 Iowa, 615, 22 L. R. A. N. S. 1161; *Leavitt v. Dunn*, 56 N. J. L. 309, 44 Am. St. 402; *Alfson v. Bush Co.*, 182 N. Y. 393, 108 Am. St. 815; *Armstrong v. Grandin*, 39 Ohio St. 368.

3. *Hudnall v. Ham*, 172 Ill. 76.

4. *Kalbach v. Clark*, 133 Iowa, 215, 12 L. R. A. N. S. 801.

The words "heirs" may be, and frequently is, used to indicate those who take personal property upon the death of the owner intestate, and will be given that meaning in a will if such was the intention of the testator. *Re Line's Est.*, 221 Pa. St. 374.

5. *Byrne v. McGrath*, 130 Cal. 316, 80 Am. St. 127; *Cloud v. Bruce*, 61 Ind. 171.

6. 2 Blacks. Comm. 10.

of the decedent would be about him at the time of his death they naturally would become the next occupants' of his property. To make such occupancy uniform and to prevent unseemly contentions about property on such occasions and to preserve it for the payment of liabilities owing by the decedent at the time of his death, the law has stepped in and laid down arbitrary rules, such rules being based upon what would be just in a majority of cases, but which, of necessity, must be unjust in certain particular cases, this being, however, one of the hardships of any uniform rule or law.

§ 290. Administration—The Court. The personal property left by a decedent is known as his "estate" and comes under the control of some court designated by the statute. In the larger counties a special court is created for the sole purpose of exercising jurisdiction over estates, being known in different states by different names, such as probate courts, surrogate's court, orphans' courts, courts of ordinary, and the like. The management and settlement of an estate is known as "administration."

§ 291. Administration — Personal Representatives. While real estate descends at once to the heirs, personal estate is not distributed at once among the next of kin,^s but, from its nature and from the disposition to be made of it, must pass into the hands of someone appointed by the court who can take charge of it and place it in proper condition for ultimate distribution. The person appointed by the court, and to whom is confided the settlement and distribution of the estate of a decedent, is known in law as a "personal representative;" and in fact is a

7. 2 Blacks. Comm. 11.

8. *Hays v. Hall*, 4 Port. 374, 30 Am. Dec. 530; *Gordon v. James*, 86 Miss. 719, 1 L. R. A. N. S. 461; *Matter of Wilcox*, 194 N. Y. 228; *Anonymous*, 3 N. Car. 161, 5 Gray, Cas. on Prop. 142.

personal representative, as he represents the decedent,⁹ standing "in the dead man's shoes"¹⁰ as to his personality. If the decedent was intestate, the personal representative appointed by the court to administer the estate is called an "administrator;" but if a will was left nominating someone to execute its provisions and such nomination is confirmed by the court, the personal representative so appointed is styled an "executor."

The personal representative has the legal title¹¹ to the assets of the decedent until final distribution is made,¹² and not only is entitled to the possession of the estate but it is his duty¹³ to take possession of and to exercise control and dominion¹⁴ over it. Mismanagement or waste of an estate by a personal representative is known as a "devastavit,"¹⁵ for which he is responsible.

Statutes sometimes provide that if all of the debts of the decedent have been paid and those interested in the estate of the decedent can make a distribution amicably among themselves, it is not necessary to go into court for that purpose.¹⁶

§ 292. Administration—Who Entitled to. Statutes usually designate the persons who have a right to administer an estate. No one is compelled to assume this obligation; but usually the position is one that is desired,

9. *Linsenbigler v. Gourley*, 56 Pa. St. 166.

10. *Huthmacher v. Harris's Admr's*, 38 Pa. St. 491, 80 Am. Dec. 502, *Pattee, Illus. Cas. in Personalty*, 78, *Lawson, Cas. on Pers. Prop.* 177.

11. *Linsenbigler v. Gourley*, 56 Pa. St. 166.

12. *Burr v. Sherwood*, 3 Bradf. Surr. 85.

13. *First B'k v. Ludvigsen*, 8 Wyo. 230, 80 Am. St. 923.

14. *Baltimore Co. v. Mall*, 65 Md. 93, 57 Am. Rep. 307.

15. In this word all of the vowels are short except the third, which is long. The primary accent is upon the third syllable, and the secondary accent upon the first.

16. *Cotterell v. Coen*, 246 Ill. 410.

and the statutes determine the priorities in event of more than one person seeking the right.

Generally a surviving husband can administer on the estate of his deceased wife¹⁷ unless he is ineligible for misconduct.¹⁸ Other things being equal, the nearest of kin are preferred to those more remotely related,¹⁹ nearness being computed by counting up, from each person seeking the right to administer, the number of generations to the common ancestor of such person and the decedent, and then down to the decedent, each generation being designated as a degree; and the person having the fewest degrees between him and the decedent, counting in this manner, is regarded as the nearest of kin. The common ancestor, if living, would of course be nearer than the person whose relationship is derived through the common ancestor. For this reason a parent of the decedent would be preferred to a brother or sister²⁰ of the decedent; for, counting by degrees of relationship, the parent is but one degree from the decedent, while a brother or sister would be two degrees, that is, it is one generation to the parent of the decedent, who

17. *Re Dow*, 132 Cal. 309; *Miller v. Reinhart*, 18 Ga. 239; *O'Rear v. Crum*, 135 Ill. 294; *Hart v. Soward*, 51 Ky. 391; *Wallis v. Jones*, 42 Md. 422; *Osmun v. Galbraith*, 131 Mich. 577; *Re Hill*, 102 Mo. App. 617; *Re Stewart*, 18 Mont. 595; *Probate Judge v. Chamberlain*, 3 N. H. 129; *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Dewey v. Goodenough*, 2 Barb. 54; *Hoppliss v. Eskridge*, 37 N. Car. 54; *Batthey v. Matthewson*, 22 R. I. 474; *Truesdale v. Putegnat* (Tex. Civ. App. 1900), 59 S. W. 307; *Re Sutton*, 31 Wash. 340; *Bridgman v. Bridgman*, 30 W. Va. 212; *Lamb v. Cleveland*, 19 Can. 78. See, however, *Randall v. Shrader*, 17 Ala. 333; *Goodrich v. Treat*, 3 Colo. 408; *Williamson's Suc.* 54 La. (3 La. Ann.) 261.

18. *Coover's App.* 52 Pa. St. 427; *Cooper v. Maddox*, 34 Tenn. 135; *Re Ardern* [1898], P. 147, 67 L. J. P. & Adm. 70, 78 L. T. Rep. N. S. 536.

19. *Anderson v. Potter*, 5 Cal. 63; *Matter of Campbell* (N. Y.), 123 App. Div. 212; *Carthey v. Webb*, 6 N. Car. 268; *McClellan's App.* 16 Pa. St. 110.

20. *Brown v. Hay*, 1 Stew. & P. 102.

is the common ancestor of the decedent and his brothers and sisters, and then another degree down from the parent, or common ancestor in this case, to the brothers and sisters. If administration is sought by two or more equally akin, the court may choose the one most fit.²¹

If there are no next of kin, or they are ineligible, or refuse to apply for the right to administer, the statutes sometimes provide that creditors of the decedent may be appointed; or, in some states, an officer, known as a public administrator or administrator general,²² is appointed to take charge of such estates.

§ 293. **Administration—To Collect — Ancillary — De Bonis Non.** Sometimes administrators are appointed for a specified purpose only, as administrators to collect (*ad colligendum*); or if the decedent left property in more than one jurisdiction, the states other than the one in which he lived may appoint someone to administer upon the assets in such jurisdiction, such administration being subordinate to the administration of the state in which the decedent had his domicile, and is known as ancillary administration. The duties of an administrator in ancillary distribution are similar to those of any administrator; and if, after the payment of claims in his jurisdiction, there be a surplus, he should forward it to the principal administrator in the state where the decedent lived. Sometimes the statutes of a state provide for recognition therein of foreign administrators, permitting them to perform certain acts. If, before an administrator has fully performed his duties, he dies, resigns, or is removed, another administrator is appointed to succeed him, known as an administrator *de bonis non administratis* (of goods

21. Theriot's Suc. 116 La. 25; Taylor v. Delancy, 2 Cal. Cas. 143; Moore v. Moore, 12 N. Car. 352; Shomo's App. 57 Pa. St. 356; Bridgman v. Bridgman, 30 W. Va. 212.

22. Woerner, Admin. (2d ed.) 424, § 150.

not administered)²³ who has the same rights as the former administrator.²⁴

§ 294. **Letters of Administration.** The written authority given by the court to an administrator is known as "Letters of Administration." As soon as letters of administration are granted, the title of the administrator relates back to the death of the decedent, enabling the administrator to bring suit although the cause of action arose after the death of the decedent and before the appointment.²⁵

§ 295. **Distribution—Payment of Claims.** The statutes of the jurisdiction in which the decedent had his domicile govern the distribution of his estate.²⁶ Debts owing by the decedent at the time of his death, funeral expenses, courts costs, and sometimes other claims, must be paid before the next of kin can receive anything; and if the assets are not sufficient to pay all of the debts, certain ones may have priority, being paid in full even if other creditors do not receive anything; or in some cases the assets may be divided among the creditors *pro rata*.

23. Woerner, Admin. (2d ed.) 422, § 179. This Latin title usually is shortened to "administrator *de bonis non*," and sometimes to "administrator *d. b. n.*"

24. White v. Beard, 5 Port. 94, 30 Am. Dec. 552.

25. Griffith v. Charlotte Co., 23 S. Car. 25, 55 Am. Rep. 1, 24 Am. Law Reg. 586.

26. Brock v. Frank, 51 Ala. 85; Hewitt v. Cox, 55 Ark. 225; Apple's Est. 66 Cal. 482; Goodrich v. Treat, 3 Colo. 408; Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Grote v. Pace, 71 Ga. 231; Cooper v. Beers, 143 Ill. 25; Warren v. Hafer, 13 Ind. 167; Shick v. Howe, 137 Iowa, 249, 14 L. R. A. N. S. 980; Sneed v. Ewing, 28 Ky. 460, 22 Am. Dec. 41; Packwood's Suc. 48 La. (9 Rob.) 438, 41 Am. Dec. 341; Noonan v. Kemp, 34 Md. 73, 6 Am. Rep. 307; Garland v. Rowan, 10 Miss. 617; Richardson v. Lewis, 21 Mo. App. 531; Kingsbury v. Bazeley, 75 N. H. 13; Re Grattan (N. J.), 78 Atl. 813; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94; Williamson v. Smart, 1 N. Car. 355, 2 Am. Dec. 638; Swearingen v. Morris, 14 Ohio St. 424; Re Miller, 3 Rawle, 321, 24 Am. Dec. 345; Stent v. McLeod,

§ 296. **Distribution—Widow and Children.** If there be a widow, she generally receives one-third of the personal estate.²⁷ If the decedent left children,²⁸ they would take to the exclusion of the parents, brothers and sisters and other relatives of the decedent.

§ 297. **Next of Kin—Lineal—Collateral.** If the next of kin are descended one from another, as great-grandfather, grandfather, father, the decedent, son, grandson, great-grandson, great-great-grandson, and so on, they are known as lineal²⁹ descendants; but if they are descended from a common ancestor but not one from another, they are collateral³⁰ descendants. Thus, a brother is a collateral descendant, the decedent and the brother having the same father, but neither being descended from the other; likewise, an uncle or cousin or nephew would be related collaterally.

§ 298. **Next of Kin—Per Stirpes—Per Capita.** Sometimes the statutes provided for "representation" if the relatives of the decedent are not in equal degree. Thus, while two brothers of the decedent would be related in the same degree to the decedent, that is, in the second degree, the children of a deceased brother would be related in the third degree to the decedent, being one step further from the common ancestor, that is, from the parent of the decedent; but the statute may provide that the descendants of a deceased brother may stand in the place of, or represent, such deceased brother and take the share which otherwise would have gone to such de-

2 McCord Eq. 354; *Fidelity Co. v. Crenshaw*, 120 Tenn. 606; *Simpson v. Knox*, 1 Tex. Unrep. Cas. 569; *Rader v. Stubblefield*, 43 Wash. 334; *White v. Tennant*, 31 W. Va. 790, 13 Am. St. 896; *Ennis v. Smith*, 55 U. S. 400, 14 L. ed. 472.

27. *Eyre v. Higbee*, 35 Barb. 502, 22 How. Pr. 198.

28. *Bloomer v. Bloomer*, 2 Bradf. Surr. 339.

29. From the Latin word *linea*, a line.

30. From the Latin words *con*, with, and *latus*, the side.

ceased brother if living at the time of the death of the intestate. This is called taking *per stirpes*.³¹

If the collateral relationship is more remote than brothers and sisters, the statute may provide that the next of kin in equal degree shall take share and share alike, or *per capita* ³² as it is called, without representation. Thus, where the only next of kin of the decedent are four cousins, one of them being the only child of a deceased uncle of the decedent, and the other three being the children of another deceased uncle, if the cousins were to take *per stirpes* the estate would be divided into two equal parts, one cousin taking one-half of the estate as representative of his deceased parent, and the other three together would take the other half, or one-sixth each only, being the amount which their parent would have taken if living; but if the statute says that in such a case the next of kin shall take *per capita*, the estate would be divided equally among all of the cousins regardless of their parents, and in the illustration given each would receive one-fourth thereof. If the decedent has not left any immediate family, so that the estate has to pass to those somewhat remotely related, the statutes of distribution usually provide that the nearest of kin, that is, those having the fewest degrees of relationship between them and the decedent, shall take all of the estate to the entire exclusion of others; thus, if the only relatives surviving the decedent were an uncle and some first cousins—children of a deceased uncle, under the provisions of a statute the uncle might take all to the entire exclusion of the cousins, as the uncle would be related in the third degree, counting two degrees from the decedent up to his grandfather

31. From the Latin words *per*, through, and *stirps*, the root (plural, *stirpes*). 2 Blacks. Comm. 217. Our ancestors likened the children of a deceased person to the branches of a tree, the trunk of which was represented by the deceased parent.

32. From the Latin words *per*, by, and *caput*, the head (plural, *capita*).

who was the father of the uncle, and down one degree to the uncle, while the cousins would be a step farther from the common ancestor, or four degrees.

§ 299. **Next of Kin—Half Blood.** Generally, half-blood relatives have the same rights in the matter of distribution as the whole blood.³³ Half-blood relationship exists where two persons have but one ancestor in common instead of two. Ordinarily children have two parents in common—the father and mother, but if one of the parents dies and the survivor remarries, after which other children are born, half-blood relationship exists between the two sets of children; but in a case of that kind if one of the children should die, statutes of distribution generally provide that the half-brothers and half-sisters shall share equally with the other brothers and sisters.

§ 300. **Escheat.** If an intestate does not leave any³⁴ next of kin his property goes to the state, this passing to the state being known as Escheat.³⁵ Originally escheat related to realty only but now includes personalty;³⁶ and statutes on distribution usually provide for the contingency of an intestate not leaving any next of kin.

§ 301. **Succession—Trusts—Dissolution of Corporation.** Although transfer by succession occurs most often in the case of death of the owner of property, it may oc-

33. *Perry v. Logan*, 5 Rich. (5 S. Car. Eq.) 202.

34. In one sense everyone must leave someone related to him however distant; but escheat occurs when no one can show relationship to the decedent; or even in some cases property might escheat even if relationship could be shown, if the relationship is so remote that the decedents and the claimants were practically not related.

35. From the French, *escheoir*, to happen; such a state of facts being regarded as a contingency and accidental.

36. *Com. v. Banton*, 41 Ky. 393; *Johnston v. Spicer*, 107 N. Y. 185; *McCaw v. Galbraith*, 7 Rich. 74.

cur in some other ways. Upon the death of a trustee his rights as such might devolve upon a successor.³⁷

Upon the dissolution of a corporation, which is equivalent to its death, its personal property, after payment of its debts, devolves upon those who were the stockholders³⁸ at the time it ceased to be a distinct person, each stockholder participating in its assets in proportion to the amount of stock held by him, unless a statute, the charter or some other valid agreement provides for distribution on some other basis.

§ 302. **Actions Which Do Not Survive.** At common law certain rights of action arising out of breach of contract³⁹ passed, upon the death of the claimant, to his personal representatives, who could bring suit; or in event of the death of the defendant his estate became liable for these demands, which were regarded rather as actions against property than against persons. If, however, the right of action arose out of an injury done to the person or to the property of another for which damages only could be recovered in satisfaction, such right died with the person to whom, or by whom, the wrong was done, for neither the personal representatives of the plaintiff had received, nor those of the defendant had committed, any wrong or injury in their own personal capacity;⁴⁰ and the Latin maxim *actio personalis mori-*

37. If there were two or more trustees, upon the death of one, the survivor or survivors would take the entire legal title, but upon the death of a sole trustee his rights, as such, would devolve upon his executor; *Boone v. Citizens' B'k*, 84 N. Y. 83, 9 Abb. New Cas. 416; unless the instrument creating the trust provided for a successor, or, for some reason, a successor is appointed by a court of chancery.

38. 2 Cook, Corp. (6th ed.) 1827, § 641; *Higgins v. Downwald*, 8 Houst. 227, 40 Am. St. 141.

39. *Johnson v. Levy*, 118 La. 447, 43 So. 46; *Cox v. Martin*, 75 Miss. 229, 65 Am. St. 604, 36 L. R. A. 800.

40. 3 Blacks. Comm. 302.

*tur cum persona*⁴¹ (a personal action dies with the person) was applied. In modern times by virtue of statutes⁴² many actions for torts which formerly died with the person, now survive and may be brought by the personal representatives of the deceased⁴³ the same as actions *ex contractu*.

41. In an action of tort to the person or to property of another, where the plea must be not guilty, the maxim *actio personalis moritur cum persona* applies. *Netties v. Barnett*, 8 Port. 181; *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41; *Letson v. Brown*, 11 Colo. App. 11; *Chichester v. Union Co.* (D. C.), 1 MacArthur, 295; *Neal v. Haygood*, 1 Ga. 514; *Holton v. Daly*, 106 Ill. 131; *Reed v. Peoria Co.*, 18 Ill. 403; *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519; *Lewis v. Coal Co.*, 112 Ky. 845, 23 Ky. Law Rep. 2218, 57 L. R. A. 447; *Baltimore Co. v. Ritchie*, 31 Md. 191; *Jenks v. Hoag*, 179 Mass. 583; *Elliott v. Kansas C'y*, 210 Mo. 576; *Dillon v. R. Co.*, 38 Mont. 485; *Sawyer v. Concord Co.*, 58 N. H. 517; *Hegerich v. Keddie*, 99 N. Y. 258, 52 Am. Rep. 25; *Cardington v. Fredericks*, 46 Ohio St. 442; *Moe v. Smiley*, 125 Pa. St. 186, 3 L. R. A. 341; *Aldrich v. Howard*, 8 R. I. 125, 86 Am. Dec. 615; *Jenkins v. Bennett*, 40 S. Car. 393; *Loague v. R. Co.*, 91 Tenn. 458; *Gibbs v. Belcher*, 30 Tex. 79; *Mason v. Union Co.*, 7 Utah, 77; *Winhall v. Sawyer*, 45 Vt. 466; *Grubb v. Sult*, 73 Va. (32 Gratt.) 203; *Curry v. Mannington*, 23 W. Va. 14; *Milwaukee Co. v. Sentinel Co.*, 81 Wis. 207, 15 L. R. A. 627; *Bank v. Brady*, 184 U. S. 665, 46 L. ed. 139; *Cameron v. Milloy*, 22 Up. Can. C. P. 331; *Hambly v. Trott*, 1 Cowp. 371.

Under this rule of law it follows that if a right of action is lost by death, the corresponding liability is removed from the other party, resulting in a benefit acquired by the latter.

42. *Dunn's App.* 81 Conn. 127, 8 Am. Rep. 298; *Moore v. Pywell*, 29 App. D. C. 312, 35 Wash. Law Rep. 225, 9 L. R. A. N. S. 1078; *Jones v. Barnum*, 217 Ill. 381; *Gray v. McCallister*, 50 Iowa, 497; *Powers v. Sumbler*, 83 Kans. 1; *Stewart v. United Co.*, 104 Md. 332, 118 Am. St. 410, 8 L. R. A. N. S. 384; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Stewart v. Lee*, 70 N. H. 181; *Ten Eyck v. Runk*, 31 N. J. L. 428; *Howcott v. Warren*, 29 N. Car. 20; *Bank v. Tel. Co.*, 79 Ohio St. 89; *Randall v. Brayton*, 26 R. I. 233; *Duke v. Cable Co.*, 71 S. Car. 95; *R. Co. v. Smith*, 35 Tex. Civ. App. 351; *Lindemann v. Rusk*, 125 Wis. 210; *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713; *Mason v. Peterborough*, 20 Ont. App. 633.

43. *Mumford v. Wright*, 12 Colo. App. 214; *Musick v. Kansas Co.*, 114 Mo. 309; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Am. St. 948.

Only such actions survive as are mentioned in the statute; those not mentioned are still governed by the common law rule. *Bates v.*

§ 303. **Delay.** Delay in enforcing a right may result practically in a transfer of property, for the effect of delay may be to take away the remedy for enforcing the right; and if the right is thus taken away it follows that the person against whom the right could have been enforced, necessarily acquires a benefit by a removal of a liability. The loss of a remedy, as the effect of delay, may result from some statute of limitations or from the application of the equitable doctrine of laches.

§ 304. **Statutes of Limitations—Definition—Origin—Object.** Statutes of Limitations are such legislative enactments as prescribe the period within which actions must be brought upon certain claims or within which certain rights may be enforced,¹ after the expiration of such period the remedy being taken away. Under the old common law there was no limitation to the time within which an action *ex contractu* could be brought; later the courts adopted the rule that payment would be presumed after twenty years.² Finally the English Parliament began designating notable events, and barred actions the cause of which arose prior to such event. Thus, one statute selected the beginning of the reign of Henry the First as the event; but under such a plan the periods continually grew longer until a new event was selected. At length the statute of 32 Henry VIII, c. 2, fixed definite periods of time after the right of action accrued, within which an action should be brought thereon;³ finally the statute of 21 James I, c. 16, was passed by the English Parliament, the substance of which has been enacted in nearly all, if not in all, of the states of this country.

Sylvester, 205 Mo. 493, 120 Am. St. 761, 11 L. R. A. N. S. 1157;
Cleland v. Anderson, 66 Nebr. 252.

1. Wood, Lim. (3d ed.) 1, § 1.

2. Wood, Lim. (3d ed.) 2, § 1; Bean v. Tonnela, 94 N. Y. 331.

3. Wood, Lim. (3d ed.) 4, § 2.

The purpose of a statute of limitations is to compel the settlement of claims within a reasonable time while the evidence, upon which their enforcement or resistance rests, is fresh in the minds of witnesses.⁴ Such statutes were regarded as first by the courts as establishing merely a *prima facie* presumption of payment which could be overthrown by any competent evidence showing that the right still existed;⁵ but the modern theory is that such statutes are statutes of repose,⁶ that is, the remedy is taken away even though the debtor may admit the validity of the claim against him. Statutes of limitation do not extinguish rights, but merely take away the remedy.⁷

§ 305. **When Statute of Limitations Begins to Run—Contracts.** A statute of limitations is said to “begin to run” when the period, designated therein within which an action must be brought, commences to be computed; and a right is said to be “barred” or a claim “outlawed” when that period has terminated. The general

4. Wood, *Lim.* (3d ed.) 7, § 5; *McCarthy v. White*, 21 Cal. 495; *Gillingham v. Brown*, 178 Mass. 417, 55 L. R. A. 320; *Young v. Monpoe*, 2 Bailey (31 S. Car. Law)), 278.

5. Wood, *Lim.* (3d ed.) 2, § 1; *Gregory v. Comm.*, 121 Pa. St. 611.

6. *McCarthy v. White*, 21 Cal. 495; *Shepherd v. Thompson*, 122 U. S. 231.

Though working hardship in specific cases, such statutes are in most instances beneficent and promotive of the public good. *Conway's Ex'r v. Reyburn's Ex'rs*, 22 Ark. 290; *Gillingham v. Brown*, 178 Mass. 417, 55 L. R. A. 320. They outweigh any partial evil. *Young v. Monpoe*, 2 Bailey (13 S. Car. Law), 278. For this reason they are construed liberally, except provisions exempting certain classes from the operation of the statute, which are construed strictly. *Lawson v. Tripp* (Utah, 1908), 95 Pac. 520.

7. Wood, *Lim.* (3d ed.) 164, § 65; *Sichel v. Carrillo*, 42 Cal. 493; *Norton v. Shepard*, 48 Conn. 98; *George v. Gardner*, 49 Ga. 441; *Com. v. McGowan*, 7 Ky. 63; *Barney v. Smith*, 4 Harr. & J. 495; *House v. Carr*, 185 N. Y. 453, 6 L. R. A. 510; *Jones v. Hooks*, 23 Va. (2 Rand.) 299; *Beckford v. Wade*, 17 Ves. 87.

The civil law doctrine of prescription defeated the right itself.

rule is that the statute begins to run when the right of action accrues;⁸ and for a right of action to accrue, two things are necessary, namely, the existence of facts constituting a cause of action suable in the courts, and competent parties within the jurisdiction.⁹

Generally the statute begins to run from the breach¹⁰ of a contract, express or implied, even though the damage resulting from such breach may develop later.¹¹ It begins to run on a promissory note from the time the note becomes due;¹² if payable in installments, the statute begins to run upon each installment as it becomes due.¹³ The general rule is that covenants and warranties are broken, if broken at all, as soon as made, even though actual damage from the breach may not be sus-

8. Wood, *Lim.* (3d ed.) 295, § 119; *Lucas v. Thorington's Adm'r*, 7 Ala. 605; *Baxter v. Gay*, 14 Conn. 119; *Justice v. Orr*, 12 Ga. 137; *Bonney v. Stoughton*, 122 Ill. 536; *Hikes v. Crawford*, 67 Ky. 19; *Taggart v. Western Co.*, 24 Md. 563; *Waul v. Kirkman*, 25 Miss. 609; *Garesche v. Lewis*, 93 Mo. 197; *Berry v. Doremus*, 30 N. J. L. 399; *Gilbert v. Taylor*, 148 N. Y. 298; *Daniel v. Whitfield*, 44 N. Car. 294; *Pittsburgh Co. v. Plummer*, 37 Pa. St. 413; *Sims v. Gondelock*, 6 Rich. 100; *Tisdale v. Mitchell*, 15 Tex. 480; *Sprague v. Sprague*, 30 Vt. 483.

By the civil law, prescription did not begin to run until the creditor had a full and perfect right to prosecute his demand. *Evans' Pothier*, 404.

The time when the statute begins to run is important, because the sooner the statutory period begins, the sooner it ends, thus determining whether a delayed action is brought too late or not.

9. *Luce v. Clarke*, 49 Minn. 356.

10. *Nevitt v. Woodburn*, 160 Ill. 203, 52 Am. St. 315.

11. *Campbell v. Culver*, 67 N. Y. S. 469.

12. *Osgood v. Strauss*, 55 N. Y. 672; *Re McHenry*, [1894] 3 Ch. 290.

If the holder has a right to declare the principal sum due if interest is not paid promptly, the exercise of such option causes the statute to begin to run at once. *Westcott v. Whiteside*, (Kans.) 54 Pac. 1032.

If a bill of exchange be protested before it is due, the statute begins to run from the time of protest. Wood, *Lim.* (3d ed.) 325, § 125; *Miller v. Hackley*, 5 Johns. 375.

13. Wood, *Lim.* (3d ed.) 326, § 126; *Burnham v. Brown*, 23 Me. 400; *Baltimore Co. v. Barnes*, 6 Harr. & J. 57; *Bush v. Stowell*, 71 Pa. St. 308; *George v. Butler*, 26 Wash. 456, 90 Am. St. 756, 57 L. R. A. 396.

tained until later, as nominal damages are recoverable,¹⁴ so that the statute begins to run at once.¹⁵ In the case of a sale of goods the statute begins to run as to the unpaid price from the time payment was due.¹⁶ The statute begins to run on contracts to render services from the time the work is completed,¹⁷ even though such services continued several years;¹⁸ but if an employee is to be paid at stated intervals, as by the day, week, or month, the statute begins to run at the end of each stated period.¹⁹ The statute begins to run on a contract to marry when there is a breach of such promise, either by one of the parties putting it out of the power of such party to perform, as by marrying another, or by notice of an intention not to perform, or by a refusal to perform.²⁰

14. Wood, Lim. (3d ed.) 399, § 174; Funk v. Vonelda, 11 Serg. & R. 109.

15. Chancellor v. Wiggins, 43 Ky. 201; Blethen v. Lovering, 58 Me. 437; Chapman v. Kimball, 7 Nebr. 399; Baucum v. Streater, 50 N. Car. 70; Bogardus v. Wellington, 27 Ont. App. 530. *Contra*: Richard v. Bent, 59 Ill. 38.

16. Rous v. Walden, 82 Ind. 238; Bent v. Cook, 51 Ky. 267; The Mary Blane v. Beehler, 12 Mo. 477; Bush v. Bush, 9 Pa. St. 260; Tisdale v. Mitchell, 12 Tex. 68.

17. Wood, Lim. (3d ed.) 301, § 120; Littler v. Smiley, 9 Ind. 116; Zeigler v. Hunt, 1 McCord, 577.

When services are rendered by an attorney upon an entire contract, the right of action does not accrue until entry of final judgment; Elliot v. Law, 89 Mass. 274; but, in the absence of a special agreement, if an attorney is employed in several causes, his right of action accrues with the entry of final judgment in each, and the statute begins to run although other actions are pending. Likewise if special services are rendered for the same client, not connected with any suit, such as giving advice and drawing contracts, the statute begins to run from the time such services are rendered. Adams v. Fort Bank, 36 N. Y. 255.

18. Hall v. Wood, 75 Mass. 60; Schoch v. Garrett, 69 Pa. St. 144; Jones v. Lewis, 11 Tex. 359.

19. Wood, Lim. (3d ed.) 302, § 120; Mims v. Sturtevant, 18 Ala. 359; Ennis v. Pullman Co., 165 Ill. 161; Turner v. Martin, 4 Rob. (27 N. Y. Super.) 661; Butler v. Kirby, 53 Wis. 188; Phillips v. Bradley, 11 Jur. 264.

20. Wood, Lim. (3d ed.) 378, § 159; Blackburn v. Mann, 35 Ill. 222.

§ 306. **When Statute of Limitations Begins to Run—Conditions and Contingencies—Demand.** If a cause of action does not arise until a condition, express or implied,¹ has been performed or a contingency has happened, it is necessary for the condition to be performed² or the contingency to happen³ before the statute will begin to run.⁴ The statutes in some of the states,⁵ provide when the statute begins to run on a demand; but, in the absence of a statutory provision, if demand must be made before bringing an action, the cause of action does not accrue until a demand has been made.⁶

1. As in the case of the condition implied when money is deposited in a bank. *Wood, Lim.* (3d ed.) 301, § 119; *Payne v. Gardiner*, 29 N. Y. 146.

2. *Wood, Lim.* (3d ed.) 297, § 119; *Jones v. Lightfoot*, 10 Ala. 17; *Scott v. Osborne*, 16 Va. (2 Munf.) 413; *Robertson v. Cates*, 74 Tex. 408.

If a note or bill is made payable twelve months after demand, the statute does not begin to run until the expiration of that period after demand, as the debt does not become enforceable until then. *Wood, Lim.* (3d ed.) 322, § 125; *Richman v. Richman*, 8 N. J. L. 114. See, also, *Cole v. Joliet Co.*, 79 Ill. 96.

3. *Wood, Lim.* (3d ed.) 344, § 133; *Hathaway v. Patterson*, 45 Cal. 294; *Riddle v. Backus*, 38 Iowa, 81; *Nims v. Walker*, 65 La. (14 La. Ann.) 581; *Hall v. Thayer*, 58 Mass. 130; *Peake v. Fuller*, 123 Mich. 684; *Wood v. Myrick*, 16 Minn. 494; *Stone v. Todd*, 49 N. J. L. 274; *Tebo v. Robinson*, 100 N. Y. 27; *Titman v. Titman*, 64 Pa. St. 480; *Thompson v. Gordon*, 3 Strobh. 196; *Cann v. Cann*, 45 W. Va. 563; *Jilson v. Gilbert*, 26 Wis. 637; *Lincoln v. Luning*, 133 U. S. 529; *Tuckey v. Hawkins*, 4 C. B. 664.

If a special contract is made with an attorney under which his fee is made contingent upon collection of a demand, the statute does not begin to run upon entry of judgment, but from the time the judgment is collected. *Wood, Lim.* (3d ed.) 306, § 121; *Morgan v. Brown*, 63 La. (12 La. Ann.) 159; *Foster v. Jack*, 4 Watts, 334.

4. If a reward be offered for the conviction of a criminal, the statute does not begin to run until such conviction has been accomplished. *Wood, Lim.* (3d ed.) 300, § 119; *Ryer v. Stockwell*, 14 Cal. 134.

5. As in Alabama, New York, and Tennessee.

6. *Schroeder v. Johns*, 27 Cal. 274; *Wolfe v. Whiteman*, (Del.) 4 Harr. 246; *Armant v. New O. Co.*, 92 La. (41 La. Ann.) 1020; *Fells Inst. v. Wheedon*, 18 Md. 320; *Jameson v. Jameson*, 72 Mo. 640; *Payne*

§ 307. When Statute of Limitations Begins to Run—Accounting. Mutual accounts are those made up of matters of setoff, that is, where the parties thereto have mutual and alternating courses of dealing⁷ under an express or implied agreement that one account may, and shall, be offset against the other⁸ *pro tanto*; such as sales made or services performed by each to or for the other, the balance being constantly varying,⁹ and for the ultimate settlement of which an obligation exists.¹⁰ The statute of limitation begins to run from the date of the last item.¹¹ If an account is not mutual, that is, if all of the items on one side are payments only in partial extinguishment of the debt,¹² the statute begins to run from

v. Gardiner, 29 N. Y. 146; *Finkbone App.* 86 Pa. St. 368; *Wright v. Hamilton*, 2 Bailey (13 S. Car. Law) 51, 21 Am. Dec. 518; *Thrall v. Mead*, 40 Vt. 540; *Picquet v. Curtis*, 1 Sumn. 478.

Where a promise is made to deliver goods upon demand, the statute begins to run from the date of the demand and not from the date of the contract. *Brewster v. Hobart*, 32 Mass. 302.

A demand will be presumed from lapse of time, especially if the situation and relation of the parties are such as to render it improbable that it should be neglected. *Wood, Lim.* (3d ed.) 286, § 118.

7. *Roberts v. Roberts*, 1 M. & P. 487.

8. *Dunavant v. Fields*, (Ark.) 60 S. W. 420; *Kingsley v. Delano*, 169 Mass. 300; *McFarland v. O'Neill*, 155 Pa. St. 260; *Corrine Co. v. Toponce*, 152 U. S. 405.

9. *Abbott v. Keith*, 11 Vt. 525.

10. *Kutz v. Fleisher*, 67 Cal. 98; *Lark v. Cheatha*, 80 Ga. 1; *Dyer v. Walker*, 51 Me. 104; *Webster v. Byrnes*, 32 Md. 86; *Hollywood v. Reed*, 55 Mich. 308; *Abbey v. Hill*, 64 Miss. 240; *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496; *Roots v. Mason Co.*, 27 W. Va. 483; *Dunn v. Fleming*, 78 Wis. 545.

11. *Ashley v. Hill*, 6 Conn. 246; *Knipe v. Knipe*, 3 Blackf. 300; *M'Clellan v. Croften*, 6 Me. 308; *Penn v. Weston*, 20 Mo. 13; *Hibler v. Johnston*, 18 N. J. L. 266; *Newsome v. Persons*, 3 N. Car. 242; *Sumter v. Morse*, (S. Car.) 2 Hill, 92; *Judd v. Sampson*, 13 Tex. 19; *Moore v. Munro*, 25 Va. (4 Rand.) 488. *Contra*: *Blair v. Drew*, 6 N. H. 235.

This provision appears in the statutes of some states. *Wood, Lim.* (3d ed.) 663, § 277.

12. *Day v. Mayo*, 154 Mass. 472.

the date of each item,¹³ so that recovery can be had for those items within the statutory period only. Whenever an account is presented to a debtor who receives and retains it without objection, he is regarded as having acknowledged its correctness, and becomes bound thereby, such an account being designated as an account stated;¹⁴ and the statute begins to run from its date.¹⁵

§ 308. When Statute of Limitations Begins to Run—Limited Interests. The statute does not begin to run in favor of a bailee until demand¹ is made, or the bailee by denying the bailment converts the property² and the bailor had notice³ of such adverse claim, as until such times the possession of the bailee is in law the possession of the owner.⁴ The statute does not begin to run against a remainderman until the death of the tenant for life,⁵ as until that time a cause of action does not accrue to the remainderman. As possession by one tenant in

13. *McCullough v. Judd*, 20 Ala. 703; *Adams v. Patterson*, 35 Cal. 122; *Lark v. Cheatham*, 80 Ga. 1; *Prewett v. Runyar*, 12 Ind. 174; *Dyer v. Walker*, 51 Me. 104; *Webster v. Byrnes*, 32 Md. 86; *Bennett v. Davis*, 1 N. H. 19; *Miller v. Colwell*, 5 N. J. L. 577; *Kimball v. Brown*, 7 Wend. 322; *Adams v. Carroll*, 85 Pa. St. 209.

14. *Langdon v. Roane*, 6 Ala. 518; *Terry v. Sickles*, 13 Cal. 427; *Mansell v. Payne*, 69 La. (18 La. Ann.) 124; *Wood v. Gault*, 2 Md. Ch. 433; *Coopwood v. Bolton*, 26 Miss. 212; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Lockwood v. Thorne*, 11 N. Y. 170; *Pratt v. Weyman*, 1 McCord Eq. 156; *Tharp v. Tharp*, 15 Vt. 105.

15. *Wood*, Lim. (3d ed.) 669, § 280; *Morse v. Minton*, 101 Iowa, 603; *Lancey v. Maine Co.*, 72 Me. 84; *King v. Davis*, 168 Mass. 133; *Mills v. Fowkes*, 7 Scott, 444.

1. *Parker v. Gaines*, (Ark.) 11 S. W. 693; *Ponce v. McElvy*, 47 Cal. 154; *Louisville B'k v. Gray*, 84 Ky. 565; *Reeves v. Nye*, 28 Nebr. 571; *Fry v. Clow*, 50 Hun, 574.

2. *Wood*, Lim. (3d ed.) 292, § 118; *Reizenstein v. Marquardt*, 75 Iowa, 294.

3. The statute does not run in favor of a thief who has concealed the stolen articles, as his possession is not open, public and notorious. *Lightfoot v. Davis*, (N. Y., 1910) 91 N. E. 582.

4. *Cooper v. Cooper*, 132 Ill. 80; *Duryea v. Andrews*, 58 Hun, 607.

5. *Broome v. King*, 10 Ala. 319.

common is regarded as the possession of all, the statute does not begin to run in favor of a tenant actually in possession of the common property, until the rights of his co-tenants therein have been denied.⁶

§ 309. When Statute of Limitations Begins to Run—Implied Contracts. If money is received by one person for another, the statute begins to run from the date it is so received, in the absence of any time being designated for paying it over.⁷ Upon failure of consideration giving a right to recover money previously paid, the statute begins to run from such failure; as until that time a right of action did not accrue to recover the money.⁸ In case of mistake, the statute runs from the date thereof and not from its discovery;⁹ and on a claim for usury from the time it was paid.¹⁰

6. Wood, *Lim.* (3d ed.) 294, § 118; *McClure v. Colyear*, 80 Cal. 378. If two persons are in joint possession of property belonging to one of them, the possession of the two will be regarded as the possession of the one having title and not adverse to him. *Bragg v. Massie's Adm'r*, 38 Ala. 89, 79 Am. Dec. 82.

7. *Bowman v. Wright*, 70 Ky. 375; *Miller v. Miller*, 24 Mass. 123; *Johnson v. Smith*, 27 Mo. 591; *Mills v. Mills*, 115 N. Y. 80.

8. Wood, *Lim.* (3d ed.) 372, § 153; *Richards v. Allen*, 17 Me. 296.. If money is paid upon a contract for the sale of property which the vendor refuses or is unable to transfer, the statute does not begin to run against the vendor to recover the money until he refuses or becomes unable to sell, at which time the consideration fails. *Gross v. Kierski*, 41 Cal. 111; *Collins v. Thayer*, 74 Ill. 138; *Eames v. Savage*, 14 Mass. 425; *Harris v. Harris*, 70 Pa. St. 170; *Caplinger v. Vaden*, 24 Tenn. 629; *Taylor v. Rowland*, 26 Tex. 293; *Bowles v. Woodson*, 47 Va. (6 Gratt.) 78. If money has been paid upon an unenforceable contract, as one not in writing as required by the statute of frauds, the statute does not begin to run at the time of payment, on an action to recover the money, but from the time the other party evinces an intention not to allow the contract to be enforced. Wood, *Lim.* (3d ed.) 378, § 160; *Cairo Co. v. Parks*, 32 Ark. 181; *Collins v. Tayer*, 74 Ill. 138.

9. *Bree v. Holbech*, 2 Dougl. 655. As in the case of an overpayment of money; Wood, *Lim.* (3d ed.) 371, § 152; *Clark v. Dutcher*, 9 Cow. 674; or payment by a bank of a check bearing a forged indorsement, the payee being innocent. Wood, *Lim.* (3d ed.) 344, § 140; *Leather B'k v. Merchants' B'k*, 128 U. S. 26.

10. Wood, *Lim.* (3d ed.) 348, § 141; *Barker v. Strafford B'k*, 61 N. H. 147; *Rahway B'k v. Carpenter*, 53 N. J. L. 161.

§ 310. When Statute of Limitations Begins to Run—Sureties. Generally the statute begins to run in favor of a surety against the creditor as soon as the creditor has a right of action against the principal;¹ and if the surety² pay the debt, a right of action against the principal for indemnity arises at the time of payment, upon an implied promise, without demand,³ and not at the date or maturity of the original obligation. Where one of two or more persons jointly liable for a debt pays more than his equitable share, the statute begins to run against him at the time of such payment,⁴ as to his right for contribution from the others.

§ 311. When Statute of Limitations Begins to Run—Trusts. The general rule is that possession by a trustee is possession by the *cestui que trust*,⁵ and, however long continued, is not adverse, the rights of the *cestui*

1. *Adams v. Jones*, 68 Ala. 117.

2. *King v. Hannah*, 6 Ill. App. 495 (accommodation acceptor); *Goodenough v. Wells*, 76 Iowa, 774 (accommodation maker); *Thayer v. Daniels*, 110 Mass. 345; *Barnsback v. Reiner*, 8 Minn. 59; *Pope v. Bowman*, 27 Miss. 194 (indorser); *Burton v. Rutherford*, 49 Mo. 255; *Frank v. Brewer*, 7 N. Y. Supp. 92 (accommodation maker); *Thompson v. Stevens*, 2 Nott & M. 493; *Reeves v. Pulliam*, 54 Tenn. (7 Bart.) 119; *Hammond v. Myers*, 30 Tex. 375; *Harvey v. National Co.*, 60 Vt. 209 (accommodation maker); *Reynolds v. Doyle*, 1 M. & C. 753.

3. *Odlin v. Greenleaf*, 3 N. H. 270; *Sikes v. Quick*, 52 N. Car. 19.

If a note or obligation is paid by a surety in installments the statute runs against the surety in favor of the principal from the time of the payment of each. *Bullock v. Campbell*, 9 Gill & J. 182.

4. *Wood*, Lim. (3d ed.) 356, § 145; *Sherwood v. Dunbar*, 6 Cal. 53; *Mentzer v. Burlingame*, (Kans. 1908) 18 L. R. A. N. S. 535; *Regis v. Hebert*, 67 La. (16 La. Ann.) 224; *Buck v. Spofford*, 40 Me. 323; *Singleton v. Townsend*, 45 Mo. 379; *Peaslee v. Breed*, 18 N. H. 489; *Campbell v. Calhoun*, 1 Pa. St. 140; *Knotts v. Butler*, 10 Rich. Eq. 143; *Maxey v. Carter*, 18 Tenn. 521; *Lomax v. Pendleton*, 7 Va. (3 Call) 538. If payment be made before the debt is due, the statute would not begin to run until maturity of the debt, the co-debtors not being liable before. *Wood*, Lim. (3d ed.) 383, § 171.

5. *Wright v. Ross*, 36 Cal. 414; *Speidel v. Henrici*, 120 U. S. 377; *Smith v. Wheeler*, 1 Vent. 123.

que trust not being barred even though the trustee is inactive and does not execute the trust.⁶ To this there are two exceptions: first, where the trustee unequivocally repudiates⁷ the trust and knowledge of the disavowment is brought home to the *cestui que trust*⁸ or the trustee dies;⁹ and, second, where there are circumstances raising a presumption from lapse of time that the trust has been extinguished.¹⁰ This rule that the statute does not run in favor of a trustee applies to express trusts only, not having any application to trusts arising by implication or operation of law.¹¹

6. Wood, Lim. (3d ed.) 481, § 212; *Mathes v. Bennett*, 21 N. H. 204; *Dyer v. Walters*, 46 N. J. Eq. 485; *Bourne v. Hall*, 10 R. I. 144; *Brooks v. Brooks*, 12 S. Car. 422, 459; *Haynie v. Hall*, 24 Tenn. 290; *Bigelow v. Catlin*, 50 Vt. 410; *Baylor v. Digarnette*, 54 Va. (13 Gratt.) 152.

7. *Mable v. Bailey*, 95 N. Y. 206; *Boteler v. Allington*, 3 Atk. 453.

8. Wood, Lim. (3d ed.) 464, § 200; *Bonner v. Young*, 68 Ala. 35; *Wren v. Hollowell*, 52 Ark. 76; *Fox v. Tay*, 89 Cal. 339; *Belknap v. Gleason*, 11 Conn. 160; *Hartlet v. Head*, 71 Ga. 95; *Reynolds v. Sumner*, 126 Ill. 58; *Wilson v. Brookshire*, 126 Ind. 497; *Murphy v. Murphy*, 80 Iowa, 740; *Hall v. Ditto*, 11 Ky. Law Rep. 667; *McGuire v. Linneus*, 74 Me. 344; *Green v. Johnson*, 3 Gill & J. 89; *Dickinson v. Leominster B'k*, 152 Mass. 49; *Chadwick v. Chadwick*, 59 Mich. 87; *Smith v. Glover*, 44 Minn. 260; *Murdock v. Hughes*, 15 Miss. 219; *Smith v. Ricords*, 52 Mo. 581; *Hamilton v. Pritchard*, 107 N. Car. 128; *Marshall's Est.* 138 Pa. St. 285; *Byars v. Thompson*, 80 Tex. 468; *Charter Co. v. Grisborne*, 5 Utah, 319; *Bostwick v. Dickson*, 65 Wis. 593; *Philippi v. Philippi*, 115 U. S. 151.

9. *Mable v. Bailey*, 95 N. Y. 206.

10. Wood, Lim. (3d ed.) 483, § 213; *McCarthy v. McCarthy*, 74 Ala. 546; *Wilson v. Greene*, 49 Iowa, 251; *Merriam v. Hassam*, 96 Mass. 516; *Miner v. Bloodgood*, 50 N. Y. 337; *Edwards v. University*, 21 N. Car. 325; *Williams v. First Soc.*, 1 Ohio St. 478; *Turner v. Smith*, 11 Tex. 620; *Badger v. Badger*, 69 U. S. 87; *Cholmondeley v. Clinton*, 2 Jac. & W. 1138.

11. Wood, Lim. (3d ed.) 485, § 215; *Alston v. Alston*, 34 Ala. 15; *Wilmerding v. Russ*, 33 Conn. 77; *Wylly v. Collins*, 9 Ga. 223; *Smith v. Galloway*, 7 Blackf. 86; *Manion v. Titsworth*, 57 Ky. 582; *McDowell v. Goldsmith*, 6 Md. 319; *Harlow v. Dehon*, 111 Mass. 195; *Murdock v. Hughes*, 15 Miss. 219; *Johnson v. Smith*, 27 Mo. 591; *Cook v. Williams*, 2 N. J. Eq. 209; *Hawley v. Cramer*, 4 Cow. 717; *Wagstaff v. Smith*, 39 N. Car. 1; *Ball v. Lawson*, 4 Watts & S. 557; *Haynie v. Hall*, 24 Tenn.

§ 312. **When Statute of Limitations Begins to Run—Torts.** Against a right of action arising from tort, the statute of limitations begins to run at the time of the wrong-doing and not from the time of damage,¹ provided the injury, even though slight, is complete at that time² and nominal damages are recoverable immediately;³ nor is the rule changed because the injured party is ignorant of the facts, and discovers his injury,⁴ or the full extent of it,⁵ too late to have any redress; or even though the wrongdoer has induced the injured person to allow the time to elapse in fruitless negotiation.⁶ If, however, an act is not legally injurious until certain consequences occur, the statute does not begin to run until the consequential damage.⁷

290; *Sheppards v. Turpin*, 44 Va. (3 Gratt.) 373; *Lansdale v. Smith*, 106 U. S. 391. If a person receives money or goods under a belief that they belong to the one from whom received, when in fact they belong to another, an implied trust is raised in favor of the owner, who is entitled to bring an action at once against the person in possession; hence the statute will begin to run against the owner. *Buchan v. James*, 1 Speers Eq. 375.

1. *Battley v. Faulkner*, 3 B. & Ald. 288.

2. *Wordsworth v. Harley*, 1 B. & Ald. 391.

3. *Wood, Lim.* (3d ed.) 405, § 178.

4. *Wood, Lim.* (3d ed.) 404, § 177. The gist of the action is the breach of duty, not the consequent injury. *Gustin v. Jefferson*, 15 Iowa, 158; *Ellis v. Kelso*, 57 Ky. 296; *Thurston v. Blackiston*, 36 Md. 501; *Cook v. Rives*, 21 Miss. 328; *Northrop v. Hill*, 61 Barb. 136; *Sinclair v. Bank*, 2 Strobh. 344. If an attorney is guilty of malpractice, the cause of action therefor arises at the time it occurs, whether the client knows of it or not. *Wood, Lim.* (3d ed.) 308, § 122.

5. *Wood, Lim.* (3d ed.) 408, § 179; *Governor v. Gordon*, 15 Ala. 72; *Crawford v. Gauden*, 33 Ga. 173; *Morgan v. Plumb*, 9 Wend. 287; *Kerns v. Schoonmaker*, 4 Ohio, 331; *Wilcox v. Plummer*, 29 U. S. 172; *Brown v. Howard*, 2 B. & B. 73.

6. *East Co. v. Paul*, 7 Moore P. C. 85.

7. *Church of H. C. v. Paterson Co.*, 66 N. J. L. 218, 55 L. R. A. 86; *Bonomi v. Backhouse*, 9 H. L. Cas. 503, 1 E. B. & E. 622. In these cases the gist of the action is the damage, not the negligence or breach of duty. *Wood, Lim.* (3d ed.) 409, § 179; *Veazle v. Penobscot Co.*, 49 Me. 126. Thus, rights of action for flowing land arise when actual damage is sustained and not when the dam or other cause of

§ 313. **Running of Statute of Limitations Postponed by Fraud.** While the general rule is that the statute of limitations begins to run when the right of action accrues, there are some exceptions appearing in the statute itself.⁸ The statute will not begin to run if there has been fraud on the part of the defendant, resulting from willful suppression of the truths, until the fraud has been discovered⁹ or ought to have been discovered;¹⁰ but as soon as it is discovered, the statute begins to run.¹¹ To prevent the statute from originally beginning to run,

injury was erected. *Atl. Gt. So. Co. v. Shahan*, 116 Ala. 302; *St. Louis Co. v. Briggs*, 52 Ark. 100, 20 Am. St. 174; *Daneri v. So. Cal. Co.*, 122 Cal. 507; *Miller v. Keokuk Co.*, 63 Iowa, 680; *Miller v. Hayden*, 91 Ky. 215; *Stanchfield v. Newton*, 142 Mass. 110; *Eastman v. St. Anthony Co.*, 12 Minn. 137; *Hocutt v. Wilmington Co.*, 124 N. Car. 214; *Vickery v. Providence*, 17 R. I. 651; *Chattanooga v. Dowling*, 101 Tenn. 342.

8. *Wood, Lim.* (3d ed.) 542, § 243. In some states, without any statutory provision, it is held that fraud will postpone the running of the statute on the ground that otherwise a law whose object is to prevent fraud would be the means of making fraud successful. *Wood, Lim.* (3d ed.) 649, § 274.

9. *Wood, Lim.* (3d ed.) 356, § 144; *Cook v. Chicago Co.*, 81 Iowa, 551, 25 Am. St. 512, 9 L. R. A. 764; *Biggs v. Lexington Co.*, 79 Ky. 470; *Atlantic B'k v. Harris*, 118 Mass. 147; *Lewis v. Welch*, 47 Minn. 193; *Lightfoot v. Davis*, (N. Y. 1910) 91 N. E. 582; *Spediel v. Henrich*, 120 U. S. 377; *Moore v. Knight*, [1891] 1 Ch. 547.

If an attorney fraudulently conceals a collection made by him, the statute does not begin to run against his client until discovery of the fraud. *Wood, Lim.* (3d ed.) 310, § 122; *Wickersham v. Lee*, 83 Pa. St. 416.

Concealed fraud on the part of the principal will prevent the running of the statute in favor of his surety although the latter may be entirely innocent. *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. 75; *Leiberman v. First B'k*, (Del.) 45 Atl. 901; *McMullen v. Winfield Ass'n*, 64 Kans. 298, 91 Am. St. 236, 56 L. R. A. 924.

10. Where acts are evidenced by the public records or by judicial proceedings and the fraud might have been discovered by an examination thereof, there is such an absence of diligence in not ascertaining the truth, that the running of the statute is not postponed. *Wood, Lim.* (3d ed.) 376, § 155.

11. *Wood, Lim.* (3d ed.), 648, § 274; *Osborne v. Wilkes*, 108 N. Car. 651. This is true although the full extent or all the facts constituting the fraud are not known. *Wood, Lim.* (3d ed.) 649, § 274.

some affirmative action to conceal the fraud must be shown,¹² mere silence by the defendant not being sufficient.¹³

§ 314. **Running of Statute of Limitations Postponed by Disabilities.** As the statute of limitations does not begin to run until the cause of action accrues, and as a cause of action is not complete until there are competent parties within the jurisdiction, both plaintiff and defendant, it follows that certain disabilities will prevent the statute from beginning to run.¹ Thus, it will not begin to run for or against an infant,² there generally being a provision therein to this effect. The statute likewise generally provides that it shall not begin to run against an insane person lacking intelligence to comprehend his legal rights,³ until restored to sanity, if the right of action accrued while the insanity existed. At common law if a right of action accrued to a married woman the statute did not begin to run until the death of her husband.⁴

12. Wood, *Lim.* (3d ed.) 657, § 276; *Jackson v. Buchanan*, 59 Ind. 390.

There is a distinction between a case where a seller fraudulently has thrown the buyer off his guard and prevented such an examination as would have revealed the truth, and a false warranty. In the former the statute would not begin to run until the fraud was, or reasonably could have been, discovered; while in the latter case the statute begins to run at once although there were no means by which the buyer could have ascertained the falsity of the warranty. Wood, *Lim.* (3d ed.) 376, § 155.

13. *Boyd v. Beebe*, (W. Va. 1908) 17 L. R. A. N. S. 660.

1. *Fishwick v. Sewall*, 4 Harr. & J. 293; *Davis v. Gare*, 6 N. Y. 124; *Grubb v. Clayton*, 3 N. Car. 378; *Johnston v. Humphreys*, 12 Serg. & R. 395; *Witt v. Elmore*, 2 Bailey, 595; *Joliffe v. Pitt*, 2 Vern. Ch. 694.

The postponement of the running of the statute can be taken advantage of notwithstanding the plaintiff might have commenced an action if he had elected to do so; as in the case of an infant who by his guardian or next friend might have brought suit. Wood, *Lim.* (3d ed.) 541, § 241.

2. Wood, *Lim.* (3d ed.) 533, § 238.

3. Wood, *Lim.* (3d ed.) 534, § 239.

4. Wood, *Lim.* (3d ed.) 536, § 240; *Towers v. Hayner*, 3 Whart. 18.

The statutes of several of the states contain a provision that if, at the time a cause of action accrues against a person, he is out of the jurisdiction,⁵ such action can be commenced within the statutory period after his return. The student must note the exact wording of the statute of his own state, much depending thereon, whether it is temporary⁶ absence that postpones the running of the statute, or whether such absence must arise from domicile outside of the state.

Sometimes the statute provides that it shall not begin to run if the right of action accrues while one of the parties is in prison, this provision varying in the different states.⁷ An exception likewise is made in some states in favor of a person who is a citizen of a country at war with the United States.⁸ If a cause of action does not accrue until after the death of the creditor or of the debtor, the running of the statute is postponed; but the student must note the wording of the statute to see whether it is postponed until administration is granted,⁹ or whether it begins to run anew at death.

5. If the defendant is actually a resident of the state, the statute will run in his favor although he is living under an assumed name and purposely conceals himself. Wood, Lim. (3d ed.) 549, § 245; Engel v. Fischer, 102 N. Y. 400. Of course it would be otherwise if the statute expressly provides that his return must be open and notorious and under such circumstances that with reasonable diligence he can be found.

Sometimes the statute qualifies the provision in regard to absence, by permitting the statute to run if the defendant left known property within the state subject to attachment. Wood, Lim. (3d ed.) 548, § 245.

Some American statutes have copied the English phrase "beyond the seas," which in some states is construed to mean out of the state or jurisdiction, and in others as meaning without the United States. Wood, Lim. (3d ed.) 528, § 237.

6. Wood, Lim. (3d ed.) 547, § 245.

7. Some statutes require the imprisonment to be upon a criminal charge; Wood, Lim. (3d ed.) 540, § 241; others that it shall be beyond the limits of the state. Wood Lim. (3d ed.) 541, § 241.

8. Wood, Lim. (3d ed.) 541, § 242.

9. Wood. Limitations (3d ed.) 441, § 194; Elter v. Finn, 12 Ark. 632; Andrews v. Hartford Co., 34 Conn. 57; Sherman v. Western Co.,

Several disabilities existing at the time the right of action accrues are not merged but remain distinct; and the person under such disabilities can choose the one of which he will avail himself, and can select the one most advantageous to him.¹⁰ Thus if, at the time a right of action accrues, a party thereto is an infant and insane, remaining insane until after he attains his majority, he can avail himself of his insanity, the statute of limitations not beginning to run against him until he becomes sane; but as soon as one disability is terminated, the return and subsequent continuance of that disability will not of itself postpone the statute, provided the right of action has accrued previously, the other disability being the only one considered.¹¹ Thus, when a right of action accrues, if a party thereto is a boy of twelve and insane, who becomes sane at the age of fourteen but insane again at sixteen, remaining insane until he is twenty-five years of age, the statute will begin to run when he attains his majority although insane at that time. Likewise if there was but one disability when the right of action accrued, a disability arising subsequently will not have any effect upon the running of the statute after the original disability ceases.

Unless expressly provided by statute,¹² ignorance¹³ of a person of his rights, or insolvency of a debtor rendering a suit against him fruitless¹⁴ if brought within the statutory period, or poverty¹⁵ of the plaintiff which pre-

24 Iowa, 515; *Nelson v. Herkell*, 30 Kans. 456; *Hull v. Deatly*, 70 Ky. 687; *Fishwick v. Sewell*, 4 Harr. & J. 393; *Whitney v. State*, 52 Miss. 732; *McKenzie v. Hill*, 51 Mo. 303; *Goodhue v. Barwell*, Rice Eq. 198; *Briggs v. Thomas*, 32 Vt. 176; *Cary v. Stephenson*, 2 Salk. 421.

10. Wood, *Lim.* (3d ed.) 558, § 251.

11. Wood, *Lim.* (3d ed.) 15, § 6.

12. Generally courts will not imply exemptions to the running of the statute although seemingly as desirable as those designated by the legislature. Wood, *Lim.* (3d ed.) 558, § 252.

13. Wood, *Lim.* (3d ed.) 662, § 276.

14. *Emery v. Day*, 1 C. M. & R. 245.

15. Wood, *Lim.* (3d ed.) 559, § 252.

vented his bringing an action promptly, will not prevent the statute from beginning to run.

§ 315. Running of Statute of Limitations Suspended. So far the exceptions considered have been those which prevent the statute from beginning to run, the general rule being that after the statute once begins to run a subsequent disability cannot suspend its running¹ although if such disability had existed at the time the right of action accrued it might have postponed the running of the statute; and it does not make any difference whether the disability is that of the plaintiff or of the defendant, or whether voluntary or involuntary. The statute, however, sometimes expressly provides that certain matters shall suspend its operation after it has begun to run, some of these being the same as those which postpone the running of the statute, and which have just been considered. Thus, statutes sometimes provide that the time the debtor is absent from the state shall not be counted as any part of the period within which an action must be brought.² Absence need not be continuous; but, if within the exception of the statute, different periods may be added together.³ The fact that an action

1. Wood, Lim. (3d ed.) 557, § 251; *Bonney v. Stoughton*, 122 Ill. 536. Although insanity at the time the right of action accrued might have prevented the statute from beginning to run, insanity occurring afterwards will not stop the running of the statute. Wood, Lim. (3d ed.) 535, § 239.

2. Wood, Lim. (3d ed.) 543, § 244; *McKee v. Dodd*, 152 Cal. 637; *Hibernian Ass'n v. Commercial B'k*, 157 Ill. 524; *McCann v. Randall*, 147 Mass. 81, 9 Am. St. 666; *Fisher v. Fisher*, 43 Miss. 212; *Shaffer's Est.* 57 Pittsb. Leg. J. 192.

Sometimes a statute provides that the running of the statute is suspended only when the debtor absconds from the state, that is leaves it secretly. If the debtor leaves openly, the statute is not suspended though he never returns. Wood, Lim. (3d ed.) 553, § 248.

Other statutes allow their running to be suspended if the debtor merely conceals himself; in which case concealment need not be fraudulent. Wood, Lim. (3d ed.) 553, § 249.

3. Wood, Lim. (3d ed.) 550, § 247.

is enjoined⁴ will not prevent the statute from running unless, as in some states, there is a statutory provision to that effect.⁵

The general rule is that if the plaintiff brings his action before the statutory period has expired but such period expires pending the action, after which the action is dismissed or a judgment recovered is reversed, a new action cannot be brought against which the statute will not be a defense.⁶ This has been changed by statute in many states,⁷ so that if a writ is not served or returned owing to unavoidable accident or to negligence of the officer, or if the suit is defeated on account of omission of duty by a clerk or for any matter of form, or if a judgment is reversed on a writ of error, the plaintiff is given additional time within which to commence a new action; but even in those states a voluntary dismissal or abandonment of an action by the plaintiff will not prevent the defendant relying upon the statute in a subsequent suit.⁸

§ 316. Statute of Limitations—When Bar is Complete. The statute of limitations in the jurisdiction where¹ the action is brought controls unless the law of

4. *Hunter v. Niagara Co.*, 73 Ohio St. 110, 3 L. R. A. N. S. 1187. If a statute does not provide for its suspension in event commencement of an action is enjoined, a court of equity cannot enter an order preventing the running of the statute, the remedy being an injunction against pleading the statute as a defense. *Wood, Lim.* (3d ed.) 541, § 243.

5. *Wood, Lim.* (3d ed.) 542, § 243.

6. *Wood, Lim.* (3d ed.) 691, § 296.

7. *Wood, Lim.* (3d ed.) 688, § 293.

8. *Wood, Lim.* (3d ed.) 692, § 296.

1. *Wood, Lim.* (3d ed.) 23, § 8; *Shewalter v. Bergman*, 123 Ind. 155; *Bruce v. Luck*, 4 Greene, 143; *Thibodeau v. Levasseur*, 36 Me. 362; *Pearsall v. Dwight*, 2 Mass. 84; *Home Co. v. Elwell*, 111 Mich. 689; *Paine v. Drew*, 44 N. H. 306; *Richards v. Bickley*, 13 Serg. & R. 395; *Crocker v. Avery*, 3 R. I. 178; *Pegram v. Williams*, 4 Rich. 219; *Gassaway v. Hopkins*, 38 Tenn. 383; *Cartier v. Page*, 8 Vt. 146; *Urton v. Hunter*, 2 W. Va. 83; *Willard v. Wood*, 164 U. S. 502; *Dupleix v. De Roven*, 2 Vern. Ch. 540.

the place in which a contract was entered into forms a part of it,² or the statute of another jurisdiction has taken away the right³ and not merely the remedy. If a statute gives a right⁴ which otherwise would not exist and provides a period within which it shall be enforced, the clause relating to the time of its enforcement is a condition⁵ rather than a limitation and controls in whatever jurisdiction suit may be brought.⁶

The length of time after which the statute of limitations becomes a defense varies largely in the different jurisdictions, and the student must consult the statutes of his own state. The period for one class of claims may not be the same as that for another class. Thus the period usually is shorter for oral and implied contracts than for written ones; for a written contract not under seal than for one under seal or a specialty;⁷ for a contract not attested than for one which is witnessed; and for a contract than for a judgment.⁸ Some statutes specifically enumerate certain kinds of contracts, designating a period for each. Usually actions growing out of torts have shorter period than those arising out of con-

2. *Hutchinson v. Ward*, 192 N. Y. 375.

3. *Wood, Lim.* (3d ed.) 24, § 8; *Jones v. Jones*, 18 Ala. 248; *McArthur v. Goodin*, 75 Ky. 274; *Harper v. Hampton*, 1 Harr. & J. 622; *Fletcher v. Spaulding*, 9 Minn. 64; *Perkins v. Guy*, 55 Miss. 153; *McMerty v. Morrison*, 62 Mo. 140; *Gans v. Frank*, 36 Barb. 320.

4. *Wood, Lim.* (3d ed.) 441, § 194; *Andrews v. Hartford Co.*, 34 Conn. 57; *Sherman v. Western Co.*, 24 Iowa, 515; *Halsey v. McLean*, 94 Mass. 439; *St. Louis Co. v. Sizemore*, (Tex.) 116 S. W. 403.

If a right in derogation of common law is given by statute, all restrictive language, including the limitation, will be construed against it. *Pittsburg Co. v. Hine*, 25 Ohio St. 629.

5. *Dennick v. Railroad Co.*, 103 U. S. 11.

6. *Wood, Lim.* (3d ed.) 30, § 9; *Eastwood v. Kennedy*, 44 Md. 563; *Baker v. Stonebraker*, 36 Mo. 349; *Huber v. Steiner*, 2 Bing. N. Can. 202.

7. *Wood, Lim.* (3d ed.) 67, § 23; *Mandru v. Ashby*, (Md. 1908) 71 Atl. 312; *Hewitt v. Hughes*, 39 Pittsb. Leg. J. N. S. 345.

8. *N. Y. v. Colgate*, 12 N. Y. 140.

tracts.⁹ In many of the states the statutes, after specifying certain actions, provide a period covering all other rights of action not specified.¹⁰ In the absence of any such provision there is a common law presumption of payment after twenty years.¹¹

Statutes frequently provide that claims not presented against the estate of a deceased person within a certain time after the death of the debtor or after the appointment of a personal representative, shall be barred forever; and this statute must be complied with strictly¹² unless the statute gives the court power to excuse the delay.

While the general rule is that a court cannot be ousted of its jurisdiction, yet parties to a contract may provide therein a time within which an action upon such contract shall be brought, which limitation if reasonable¹³ is bind-

9. Frequently a party having an election of remedies, as between trover for conversion of property and assumpsit upon an implied contract for its value, may prevent the defense of the statute. *Wood, Lim.* (3d ed.) 404, § 177; *Ivey v. Owens*, 28 Ala. 641; *House v. Carr*, 185 N. Y. 453, 6 L. R. A. N. S. 510; *Kirkman v. Phillips*, 63 Tenn. (7 Heisk.) 222. As one remedy is barred sooner than the other, the plaintiff selects the one against which the statute has not run.

10. *Wood, Lim.* (3d ed.) 382, § 166; *Bassett v. Bassett*, 22 Ill. App. 543.

11. *Bean v. Tonnele*, 94 N. Y. 381; *Perry v. Logan*, 5 Rich. Eq. (5 S. Car. Eq.) 202.

12. *Badger v. Kelley*, 10 Ala. 944; *French v. Davis*, 38 Miss. 218; *Thrash v. Sumwalt*, 5 Mo. 13; *Walker v. Cheever*, 39 N. H. 420; *Scovill v. Scovill*, 45 Barb. 517; *Hubbard v. Marsh*, 29 N. Car. 204; *Harter v. Taggart*, 14 Ohio St. 122; *Demmy's App.* 43 Pa. St. 155; *New Eng. B'R v. Newport Co.*, 6 R. I. 154; *Maynard v. May*, 42 Tenn. 44; *Jennings v. Browder*, 24 Tex. 192; *Mann v. Flinn*, 37 Va. (10 Leigh) 93.

13. Reasonableness is dependent upon the circumstances of each case. *Wood, Lim.* (3d ed.) 110, § 51. A stipulation in a bill of lading that all claims against the carrier for damages for injuries to, or for loss of, property shall be adjusted before the goods leave the office, or claim made therefor to a "trace agent" within thirty days after shipment, has been held unreasonable and void. *Southern Co. v. Caperton*, 44 Ala. 101; *Place v. Union Co.*, 2 Hilt. 19; *Capehart v. Seaboard Co.*, 81 N. Car. 438.

ing upon the parties.¹⁴ This provision occurs most frequently in insurance policies and bills of lading when delay in making claims thereunder would result in evidence in favor of the insurer or of the carrier being lost, thus facilitating the perpetration of fraud on the company.¹⁵

Statutes frequently provide that if a right of action, which arose in another state,¹⁶ is barred in that state, it cannot be enforced in the states whose statutes contain such provision.¹⁷

The statute of limitations does not apply to actions in favor of the state,¹⁸ the common law maxim being *nullum tempus occurrit regi*,¹⁹ unless the statute expressly provides otherwise.²⁰ This rule is founded on public policy; otherwise public interests would be prejudiced by the negligence of officers. Although the statute cannot be pleaded in a suit by the government, the government can take advantage of the statute when sued;²¹ and it can be set up as a defense in a suit brought by a town, city, or county.²²

14. Wood, Lim. (3d ed.) 102, § 42; Woodbury B'k v. Charter Co., 31 Conn. 518; Brown v. Savannah Co., 24 Ga. 101; Carter v. Humboldt Co., 12 Iowa, 287; Amesbury v. Bowditch Co., 72 Mass. 603; Keim v. Home Co., 42 Mo. 38; Patrick v. Farmers' Co., 43 N. H. 621; Portage Co. v. West, 6 Ohio St. 599; Edwards v. Lycoming Co., 75 Pa. St. 378; Brown v. Hartford Co., 5 R. I. 394; Gulf Co. v. Gatewood, 79 Tex. 89; Wilson v. Aetna Co., 27 Vt. 99; McFarland v. Peabody Co., 6 W. Va. 625; Davidson v. Phoenix Co., 4 Sawy. 594.

15. Peoria Co. v. Whitehall, 25 Ill. 466.

16. Luce v. Clarke, 49 Minn. 356; Hunter v. Niagara Co., 73 Ohio St. 110, 3 L. R. A. N. S. 1187; Lawson v. Tripp, (Utah, 1908) 95 Pac. 520.

17. Wood, Lim. (3d ed.) 27, § 8; Van Dorn v. Bodley, 38 Ind. 402; Hoggett v. Emerson, 8 Kans. 262; State v. Ladd, 1 Biss. 69. See, also, Walworth v. Routh, 65 La. (14 La. Ann.) 205.

18. Wood, Lim. (3d ed.) 111, § 52; Ware v. Greene, 37 Ala. 349; State B'k v. Brown, 2 Ill. 106; State v. Pratt, 8 Mo. 268.

19. Latin, time does not run against the king.

20. Wood, Lim. (3d ed.) 115, § 52.

21. Wood, Lim. (3d ed.) 117, § 52.

22. Wood, Lim. (3d ed.) 118, § 53.

The general rule is that if a debt is secured by a lien, such lien is not lost by the debt becoming barred;²³ and while the general rule is that the discharge of a debt will discharge a mortgage given to secure it, this rule applies merely to cases where the debt is extinguished, and not where the remedy only is barred; in the latter event the mortgage can be enforced²⁴ unless the mortgage also is barred by the statute. As long as a debt is not barred, a mortgage given to secure it can be enforced.²⁵

Generally when a barred claim is set up for the purpose of extinguishing or of diminishing the demand of the plaintiff, he can plead the statute of limitations thereto²⁶ unless such claim arose out of the transaction concerning which the plaintiff brings suit.²⁷ However, a claim of the defendant against the plaintiff, not barred when the action is commenced by the plaintiff, is available as a set-off although barred at the time it is pleaded as a set-off by the defendant.²⁸

23. Wood, *Lim.* (3d ed.) 500, § 222; *Belknap v. Gleason*, 11 Conn. 160; *Hardin v. Boyd*, 113 U. S. 765. If a debt is secured by a pledge, the debtor cannot recover the pledged property after the debt is barred, without payment. *Shaw v. Silloway*, 145 Mass. 503.

24. Wood, *Lim.* (3d ed.) 520, § 234. In some states, as California, Illinois, Iowa, Kansas, Nebraska, Nevada, Texas, and England, when a debt is barred, a mortgage given to secure it is likewise barred, either on the theory that the mortgage is a mere incident of the debt, or because the importance attached to a sealed instrument by the old common law is no longer recognized. Wood, *Lim.* (3d ed.) 504, § 223.

A court of equity will not restrain a sale under a power contained in a mortgage because the statute has run against an action to foreclose it. *House v. Carr*, 185 N. Y. 453, 6 L. R. A. N. S. 510.

25. *Cross v. Allen*, 141 U. S. 528.

26. Wood, *Lim.* (3d ed.) 672, § 281; *Harwell v. Steel*, 17 Ala. 372; *Ruggles v. Keele*, 3 Johns. 261; *Caldwell v. Powell*, 53 Tenn. (6 Bart.) 82; *Hicks v. Hicks*, 5 East. 16.

27. If an action is brought to recover the price of goods sold, the defendant may recoup for the unsoundness of the goods, although an action by the buyer against the seller for damages would have been barred. *Riddle v. Kreinbiehl*, 63 La. (12 La. Ann.) 297.

28. Wood, *Lim.* (3d ed.) 673, § 282; *Moore v. Loblin*, 26 Miss. 304; *McElwig v. James*, 36 Ohio St. 384; *Trimyer v. Pollard*, 46 Va. (5 Gratt.) 460.

§ 317. Statute of Limitations—Commencement of Suit. The statute of limitations will not have any effect on a right if an action to enforce it is commenced before the designated statutory period has expired.¹ If, after an action has been brought and while it is still pending, the statutory period expires, after which the plaintiff amends his declaration or complaint, he will not be prejudiced if the amendment does not present a new or different cause of action,² as such amendment relates back to the commencement of the suit; but if the amendment presents a new cause of action the statute would be a good defense.³

§ 318. Statute of Limitations—Revival by New Promise, Acknowledgment, or Part Payment. After a claim is barred by the statute of limitations or a portion of the statutory period has run, the defendant may waive his defense, either by word or by act, absolutely or conditionally.⁴ If the creditor for a consideration gives his debtor more time, the statute does not begin to run until the expiration of such extended time.⁵

An unqualified⁶ promise by a debtor to pay a barred

In other words, the bringing of an action by one party saves from the operation of the statute all such claims of the defendant against the plaintiff as properly are the subject of set-off and which in fact are pleaded as a set-off in that action. *Dunham Co. v. Holt*, 124 Ala. 181; *Perkins v. West Co.*, 120 Cal. 27; *Walker v. Clements*, 15 Q. B. 1046.

1. *Jewett v. Greene*, 8 Me. 447.

2. *Hougland v. Avery Co.*, 246 Ill. 609.

3. *Wood, Lim.* (3d ed.) 690, § 294; *Mahoney v. Park Co.*, 217 Pa. St. 20.

4. *Gillingham v. Brown*, 178 Mass. 417, 55 L. R. A. 320.

5. *Wood, Lim.* (3d ed.) 338, § 137; *Irving v. Veitch*, 3 M. & W. 90.

6. *Head v. Mauners*, 28 Ky. 255; *Allen v. Webster*, 15 Wend. 284; *Ash v. Patton*, 3 Serg. & R. 300; *Bell v. Morrison*, 26 U. S. 351.

An express promise to pay a bond which is barred does not remove the bar; *Wood, Lim.* (3d ed.) 166, § 66; as a specialty cannot be affected by a promise not under seal. *Wood, Lim.* (3d ed.) 403, § 176.

debt waives the defense of the statute of limitations;⁷ likewise an express or implied⁸ acknowledgment of a debt will waive the statute⁹ up to the time the acknowledgment is made, whether before or after the bar is complete,¹⁰ provided such acknowledgment is consistent¹¹ with, and implies,¹² a promise to pay. The statutes of nearly all of the states, in order to prevent fraud and perjury,¹³ provide that an acknowledgment, in certain cases, must be in writing¹⁴ to have any effect; though in the absence of any statutory provision an acknowledgment need not be in any particular form.¹⁵ An action arising from a

7. Wood, Lim. (3d ed.) 160, § 64; Mellick v. De Seelhorst, 1 Ill. 221, 12 Am. Dec. 172.

In some states such new promise must be in writing. Boone v. Colehour, 165 Ill. 305.

8. Currier v. Lockwood, 40 Conn. 349.

9. Bean v. Wheatley, (D. C.) 13 App. Cas. 473, 26 Wash. Law Rep. 805; Elder v. Dyer, 26 Kans. 604; Lee v. Polk, 4 McCord, 215.

10. Wood, Lim. (3d ed.) 227, § 81; St. John v. Garrow, 4 Port. 223, 29 Am. Dec. 280; Austin v. Bostwick, 9 Conn. 496; Ayers v. Richards, 12 Ill. 146; Little v. Blunt, 33 Mass. 359; Patton v. Hassinger, 69 Pa. St. 311; Carlton v. Ludlow Mill, 27 Vt. 496.

11. Wood, Lim. (3d ed.) 194, § 70; Holberg v. Jaffray, 65 Miss. 526; Ashby v. Washburn, 23 Nebr. 571; Phelps v. Sleeper, 17 N. H. 332.

12. Ross v. Ross, 20 Ala. 105; Grant v. Ashley, 12 Ark. 762; Mellick v. De Seelhorst, 1 Ill. 221, 12 Am. Dec. 172; Oakson v. Beach, 36 Iowa, 171; English v. Walthen, 72 Ky. 387; Hall v. Bryan, 50 Md. 194; Ten Eyck v. Wing, 1 Mich. 40; Bloodgood v. Bruen, 8 N. Y. 362; Faison v. Bowden, 76 N. Car. 425; Wells v. Wilson, 140 Pa. St. 145; Broddie v. Johnson, 33 Tenn. 464; Smith v. Fly, 24 Tex. 345; Phelps v. Stewart, 2 Vt. 256; Bell v. Crawford, 49 Va. (8 Gratt.) 110; Abrahams v. Swann, 18 W. Va. 274, 41 Am. Rep. 692; Carpenter v. State, 41 Wis. 36; Moore v. Bank of Columbia, 31 U. S. 86.

13. Dickenson v. Hatfield, 5 C. & P. 46.

14. Wood, Lim. (3d ed.) 231, § 83; Floyd v. Pearce, 57 Miss. 140.

The acknowledgment should be signed by the debtor; Wood, Lim. (3d ed.) 243, § 94; and delivered. Abercrombie v. Butts, 72 Ga. 74, 53 Am. Rep. 832; Merriam v. Leonard, 60 Mass. 151; Allen v. Walter, 70 Mo. 138.

15. Catholic Univ. v. Waggaman, (App. D. C. 1909) 37 Wash. Law Rep. 42.

tort cannot be revived by an acknowledgment,¹⁶ the gist of such an action being the injury and not a promise, and an acknowledgment does not make the defendant commit the tort over again.¹⁷

In order to waive the statute an acknowledgment must be distinct, unambiguous and unequivocal¹⁸ and relate to a particular demand.¹⁹ If the indebtedness is general and a part of it is barred, a general acknowledgment will not remove the bar as to the barred portion,²⁰ as the acknowledgment may have been intended to apply to that portion of the indebtedness not barred.²¹ An acknowledgment, though clear, is not sufficient if the debtor con-

16. Wood, Lim. (3d ed.) 168, § 66; *Goodwyn v. Goodwyn*, 16 Ga. 114; *Nelson v. Patterson*, 229 Ill. 240; *Galligher v. Hollingsworth*, 3 Harr. & M. 122; *Vickers v. Stoneman*, 73 Mich. 419; *Morris v. Lyon*, 4 Va. 381; *Hurst v. Parker*, 1 B. & Ald. 92.

17. *Oothout v. Thompson*, 20 Johns. 278.

18. Wood, Lim. (3d ed.) 194, § 70; *Strickland v. Walker*, 37 Ala. 385; *Thomas v. Carey*, 26 Colo. 485; *Marshall v. Dalliber*, 5 Conn. 480; *Waples v. Layton*, (Del.) 3 Harr. 508; *Bean v. Wheatley*, (D. C.) 13 App. Cas. 473, 26 Wash. Law Rep. 805; *Sennott v. Horner*, 30 Ill. 429; *French v. Frazier*, 30 Ky. 425; *Union B'k v. Evans*, 94 La. (43 La. Ann.) 372; *Brackett v. Mountfort*, 12 Me. 72; *Stockett v. Sasscer*, 8 Md. 374; *Mumford v. Freeman*, 49 Mass. 432; *Beasley v. Evans*, 35 Miss. 192; *Ashby v. Washburn*, 23 Nebr. 571; *Phelps v. Sleeper*, 17 N. H. 332; *Belles v. Belles*, 1 N. J. L. 339; *Wakeman v. Sherman*, 9 N. Y. 88; *Royster v. Granville Co.*, 98 N. Car. 148; *Croman v. Stull*, 119 Pa. St. 91; *Lange v. Carruthers*, 70 Tex. 718; *Hunter v. Kittredge*, 41 Vt. 350; *Shepherd v. Thompson*, 122 U. S. 231; *Yea v. Fouraker*, 2 Burr. 1099.

19. *Conway's Ex'r v. Reyburn's Ex'rs*, 22 Ark. 290; *Catholic Univ. v. Waggaman*, (App. D. C., 1909) 37 Wash. Law Rep. 42; *Conway v. Williams*, 30 La. (10 La.) 568, 29 Am. Dec. 466; *Hussey v. Kirkman*, 95 N. Car. 63; *Brailsford v. James*, 3 Strobb. 171; *Switzer v. Noffsinger*, 82 Va. 513.

20. *Boxley v. Gayle*, 19 Ala. 151; *Buckingham v. Smith*, 23 Conn. 453; *Walker v. Griggs*, 32 Ga. 119; *Smith v. Moulton*, 12 Minn. 352.

21. Wood, Lim. (3d ed.) 196, § 70; *Morgan v. Walton*, 4 Pa. St. 32. An admission by a debtor that he owed the complainant a large sum of money, will not take a note out of the statute if there was other indebtedness. *Stafford v. Bryan*, 3 Wend. 532.

nects with it anything showing an intention not to pay;²² for in such case a promise to pay cannot be implied,²³ he expressly having indicated the contrary.²⁴ Likewise the statute is not waived by a mere acknowledgment that a claim has never been paid,²⁵ with an expression of regret²⁶ thereat, and a hope,²⁷ expectation or intention²⁸ to pay in the future, without something indicating a present intention to be bound.²⁹ If the acknowledgment is conditional,³⁰ there must be a compliance with the condition

22. Wood, Lim. (3d ed.) 194, § 70; Peterson v. Cobb, 4 Fla. 481, Norton v. Colby, 52 Ill. 198; Gray v. McDowell, 69 Ky. 475; Wakeman v. Sherman, 9 N. Y. 88; Bell v. Morrison, 26 U. S. 351.

23. Bates v. Bates, 33 Ala. 102; Smith v. Talbot, 11 Ark. 666; Walker v. Walton, 18 Ga. 119; Miflin v. Stalker, 4 Kans. 283; Harman v. Claiborne, 52 La. (1 La. Ann.) 342; McDowell v. Goldsmith, 24 Md. 214; Gillingham v. Brown, 178 Mass. 417, 55 L. R. A. 320; Ten Eyck v. Wing, 1 Mich. 40; Westbrook v. Beverly, 19 Miss. 419; Tichenor v. Colfax, 4 N. J. L. 153; Loftin v. Aldridge, 48 N. Car. 328; Gray v. Kernahan, 2 Mill. 65; Crowder v. Nichol, 17 Tenn. 453; Tazwell v. Wittle, 54 Va. (13 Gratt.) 329; Moore v. Stevens, 33 Vt. 308.

24. Wood, Lim. (3d ed.) 190, § 69; Oakes v. Mitchell, 15 Me. 360; Kensington B'k v. Patton, 14 Pa. St. 479. A statement that "I know that I owe the money but I will never pay it" repels any inference of a promise to pay. Wood, Lim. (3d ed.) 191, § 69; A'Court v. Smith, 3 Bing. 392.

25. Laurence v. Hopkins, 13 Johns. 288; Guler v. Pearce, 2 Browne, 35; Allcock v. Hill, (S. Car.) 2 Hill, 326; Moore v. Bank of Columbia, 31 U. S. 86.

26. Wood, Lim. (3d ed.) 206, § 73.

27. Marseilles v. Kenton, 17 Pa. St. 238; Hart v. Prendergast, 14 M. & W. 741.

28. Denny v. Marrett, 29 Minn. 361; Lowery v. Robinson, 141 Pa. St. 189.

29. Ringo v. Brooks, 26 Ark. 540; Chambers v. Ruby, 47 Mo. 99; Simonton v. Clark, 65 N. Car. 525; Harwell v. M'Culloch, 2 Tenn. 275.

30. Wood, Lim. (3d ed.) 174, § 68; St. John v. Garrow, 4 Port. 223, 29 Am. Dec. 280; Catholic Univ. v. Waggaman, (App. D. C., 1909) 87 Wash. Law Rep. 42; Hicks v. Thomas, Dudley, 218; Mellick v. De Seelhorst, 1 Ill. 221, 12 Am. Dec. 173; Moorehead v. Gallinger, 9 Iowa, 519; Warren v. Perry, 65 Ky. 447; Pearson v. Harper, 62 La. (11 La. Ann.) 184; Oliver v. Gray, 1 Harr. & G. 204, 55 L. R. A. 320; Stowell v. Fowler, 59 N. H. 585; Cocks v. Weeks, (N. Y.) 7 Hill, 45; McGlensey v. Fleming, 20 N. Car. 129; Kensington B'k v. Patton, 16 Pa. St. 479;

The statutes of nearly all of the states provide that part payment,¹ either of principal or of interest,² whether made before or after the bar of the statute has attached,³ will stop the running of the statute, part payment without qualification⁴ operating as an acknowledgment⁵ of the balance from which the law implies a promise to pay.⁶ Although, in the absence of application by his

Shaw v. Newell, 1 R. I. 483; *Allcock v. Ewen*, (S. Car.) 2 Hill 326; *Slack v. Norwich*, 32 Vt. 313; *Farmers' B'k v. Clark*, 31 Va. (4 Leigh) 603; *Lang v. Caruthers*, 70 Tex. 718; *Kampshall v. Goodman*, 6 McLean, 189; *Tanner v. Smart*, 6 B. & C. 603. If a debtor agrees to pay a barred debt in installments, he cannot be compelled to pay it in any other way. *Gillingham v. Brown*, 178 Mass. 417, 55 L. R. A. 320.

1. *Wood, Lim.* (3d ed.) 245, § 96; *St. John v. Garrow*, 4 Port. 223, 29 Am. Dec. 280; *McAbee v. Wiley*, (Ark.) 122 S. W. 623; *Hunt v. Holly*, 18 Ga. 378; *Mellick v. De Seelhorst*, 1 Ill. 221, 12 Am. Dec. 172.

In a few states, owing to the peculiar wording of the statute, a partial payment on a note or on other similar obligations does not remove the statutory bar unless accompanied by an express acknowledgment of further indebtedness or an express promise to pay it. *Wood, Lim.* (3d ed.) 249, § 97; *Michigan Co. v. Brown*, 11 Mich. 265; *Smith v. Westmoreland*, 20 Miss. 663; *Steel v. Matthews*, 15 Tenn. 313.

2. *Wood, Lim.* (3d ed.) 263, § 105; *Barron v. Kennedy*, 17 Cal. 574; *Sanford v. Hayes*, 19 Conn. 591; *Meltzer v. Todd*, 12 Ind. App. 381; *Marcelin v. Creditors*, 72 La. (21 La. Ann.) 423; *Fryeburg v. Osgood*, 21 Me. 176; *Sigourney v. Drury*, 31 Mass. 387; *Bank of Utica v. Ballou*, 49 N. Y. 155; *Walton v. Robinson*, 27 N. Car. 341; *De Koslowski v. Yesler*, 2 Wash. Terr. 407; *Cucullu v. Hernandez*, 103 U. S. 105; *Wyatt v. Hodson*, 8 Bing. 309.

3. *Wald v. Arnold*, 168 Mass. 134; *Cowhick v. Shingle*, 5 Wyo. 37.

4. *Clark v. Brown*, 80 Minn. 361; *Dodge v. Leavitt*, 59 N. H. 245.

If payment is made under such circumstances as to rebut a promise to pay, the operation of the statute is not affected. *Wood, Lim.* (3d ed.) 247, § 97; *Smith v. Eastman*, 57 Mass. 355; *Bell v. Crawford*, 49 Va. (8 Gratt.) 110.

5. *Barron v. Kennedy*, 17 Cal. 547; *U. S. v. Wilder*, 80 U. S. 254.

6. *Wood, Lim.* (3d ed.) 327, § 126; *Green v. Greensboro Col.*, 83 N. Car. 440.

"There cannot be any more unequivocal acknowledgment of a present existing debt than a payment on account of it." *Barclay's App.* 64 Pa. St. 69. "A promise is frequently made rashly and is always liable to misconstruction; whereas a payment is not supposed

debtor, a creditor may appropriate a part payment to a barred debt,⁷ the bar of the statute will not be removed thereby as to the balance.⁸

At common law, part payment by one of several joint debtors before the statute of limitations attached, suspended it as to all;⁹ but payment made after the statute had attached, revived the debt only as to the party making the payment.¹⁰ The reason of the distinction was that after the bar became complete, to withdraw the protection of the statute would subject the debtor who was not a party to the payment, to a new liability not created by the original contract. The modern rule is that a promise, acknowledgment, or part payment by a joint debtor

to be made unadvisedly. A person may part with his words rashly, not so with his money." *Wyatt v. Hodson*, 1 Moore & S. 447.

7. *Wood, Ltd.* (3d ed.) 269, § 110; *Harrison v. Davies*, 74 La. (23 La. Ann.) 216.

8. *Miller v. Cinnamon*, 168 Ill. 447; *Blake v. Sawyer*, 83 Me. 129; *Ramsey v. Warner*, 97 Mass. 8; *Mills v. Fowkes*, 5 Bing. N. Cas. 455. *Contra*: *Beck v. Haas*, 31 Mo. App. 180; *Robie v. Briggs*, 59 Vt. 448.

9. *Clark v. Sigourney*, 17 Conn. 511; *Burgoon v. Bixler*, 55 Md. 384; *Bennett v. McCanse*, 65 Mo. 194; *Briggs v. Starke*, 2 Mill 111, 7 S. Car. Law, 289, 12 Am. Dec. 659.

10. *Mason v. Howell*, 14 Ark. 199; *State Co. v. Cochran*, 130 Cal. 245; *Emmons v. Overton*, 57 Ky. 643; *McKenney v. Bowie*, 94 Me. 397; *Ellicott v. Nichols*, 7 Gill. 85; *Sigourney v. Drury*, 31 Mass. 391; *Mayberry v. Willoughby*, 5 Nebr. 368; *Van Keuren v. Parmalee*, 3 N. Y. 523; *McIntire v. Oliver*, 9 N. Car. 209; *Goudy v. Gillam*, (S. Car.) 2 Hill, 28; *Whitcomb v. Whiting*, 2 Dougl. 652.

Under the common law rule, if a principal and surety were co-debtors, payment by the principal might have the effect of continuing the liability of the surety. *Quimby v. Putnam*, 28 Me. 419; *Schindel v. Gates*, 46 Md. 604; *Mainzinger v. Mohr*, 41 Mich. 685; *Nat'l Bk of Delavan v. Cotton*, 53 Wis. 31; *Cross v. Allen*, 141 U. S. 528; *Whitcomb v. Whiting*, 2 Dougl. 652.

An admission and a promise to pay or a part payment by the principal maker of a note will not affect the running of the statute against a co-maker who is a surety. *Lowther v. Campbell*, 8 Ala. 353. Payment by the principal does not renew a note as to a surety unless a party to such payment. *Hunter v. Robertson*, 30 Ga. 479; *Walters v. Kraft*, 23 S. Car. 578, 55 Am. Rep. 44.

at any time will not affect the others¹¹ unless made at their request.¹²

One partner can bind the others by a promise to pay a partnership debt upon which the statute has not run,¹³ for, as long as the partnership continues, each partner is the agent of the others;¹⁴ but after dissolution of a firm, acknowledgments, promises, or part payments by one of the former partners will not renew the debt as to the others.¹⁵ In some states, however, an acknowledgment, promise, or part payment made by one partner after dissolution of a partnership before the statute has run will suspend the statute as to the others,¹⁶ but a promise made after dissolution and after the statute has run will not af-

11. Wood, *Lim.* (3d ed.) 676, § 285; *Fairbanks v. Dawson*, 9 Cal. 89; *Tate v. Clements*, 16 Fla. 339; *Kallenbach v. Dickinson*, 100 Ill. 427; *Steele v. Soule*, 20 Kans. 39; *Schindel v. Gates*, 46 Md. 604; *Rogers v. Anderson*, 40 Mich. 290; *Whipple v. Stevens*, 22 N. H. 219; *Van Keuren v. Parmalee*, 2 N. Y. 523; *Campbell v. Brown*, 86 N. Car. 376; *Bush v. Stowell*, 71 Pa. St. 208; *Muse v. Donelson*, 21 Tenn. 166; *Bell v. Morrison*, 26 U. S. 351; *Re Wolmershausen*, 62 L. T. 541.

Payment by one of two sureties will not remove the bar of the statute as to the other. *Exeter B'k v. Sullivan*, 6 N. H. 124.

12. *Munro v. Potter*, 34 Barb. 58; *McConnell v. Merrill*, 53 Vt. 147.

Payment starts the statute running again against a surety who stands by consenting. *Glick v. Crist*, 37 Ohio St. 388.

13. *Harding v. Butler*, 156 Mass. 34; *McCoon v. Galbraith*, 29 Pa. St. 293.

14. *Mechem*, Part. 114, § 164; *Watson v. Woodman*, L. R. 20 Eq. 730.

15. Wood, *Lim.* (3d ed.) 477, § 210; *Knight v. Clements*, 45 Ala. 89; *Tate v. Clements*, 16 Fla. 339; *Kallenbach v. Dickinson*, 100 Ill. 427; *Yandes v. Lefavour*, 2 Blackf. 371; *Briscoe v. Anketell*, 28 Miss. 361; *Whipple v. Stevens*, 22 N. H. 219; *Van Keuren v. Parmalee*, 2 N. Y. 523; *Palmer v. Dodge*, 4 Ohio St. 21; *Bush v. Stowell*, 71 Pa. St. 208; *Bulcken v. Rohde*, 81 S. Car. 503; *Muse v. Donelson*, 21 Tenn. 166; *Bell v. Morrison*, 26 U. S. 351.

16. *Beardsley v. Hall*, 36 Conn. 270; *Schindel v. Gates*, 46 Md. 604; *McClurg v. Howard*, 45 Mo. 365; *Mayberry v. Willoughby*, 5 Nebr. 368; *Merritt v. Day*, 38 N. J. L. 32; *Green v. Greensboro* Col. 88 N. Car. 449.

fect them.¹⁷ In a few states it has even been held that part payment made by one partner after dissolution and after the statute has run will bind all of the former partners.¹⁸ The matter sometimes is regulated by statute. In those states in which there is a statutory provision requiring a new promise to be in writing and signed, it is not within the power of one joint debtor or of one partner to charge the others without their consent.¹⁹

Indorsement by creditor ²⁰ of a part payment on a note without additional proof ²¹ does not always afford evidence of payment, generally being an act in furtherance of the interest of the creditor,²² who is not allowed to manufacture evidence for himself.²³ If, however, an indorsement is shown to have been made a sufficient time before the statute has run to repel any idea that it was made solely to prolong the life of the note, being against the interest of the payee, it will be admitted as evidence.²⁴

An acknowledgment of a barred debt does not create a new obligation but merely revives the old,²⁵ and suit

17. *Steele v. Jennings*, 1 McMull. 297.

18. *Mix v. Shattuck*, 50 Vt. 421.

19. *Wood, Lim.* (3d ed.) 676, § 285; *Bulcken v. Rohde*. (1908) 81 S. Car. 503. The following states have a statutory provision that a new promise must be in writing under the hand of the party to be charged: Alabama, Arizona, California, Idaho, Iowa, Kansas, Minnesota, Montana, Nebraska, Nevada, New York, Ohio, Oregon, South Carolina, Texas, Utah, Wyoming.

20. *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693; *Connelly v. Pierson*, 9 Ill. 108; *Shaffer v. Shaffer*, 41 Pa. St. 51.

21. *Beatty v. Clement*, 63 La. (12 La. Ann.) 18; *Beltzhoover v. Yewell*, 11 Gill & J. 212; *Vaughan v. Hankinson*, 35 N. J. L. 79; *Chambers v. Walker*, 4 Rich. 548; *Waters v. Tomkins*, 2 C. M. & R. 723.

22. *Wood, Lim.* (3d ed.) 281, § 115.

23. *Brown v. Hutchings*, 11 Ark. 83; *Clapp v. Ingersoll*, 11 Me. 83; *Bailey v. Crane*, 38 Mass. 323; *Read v. Hurst*, 7 Wend. 408; *Wilcox v. Pearman*, 36 Va. (9 Leigh) 144.

24. *Alston v. State B'k*, 4 Ark. 455; *Smith v. Simmons*, 9 Ga. 418; *Howe v. Hathaway*, 20 Me. 345; *Cremer's Est.*, 5 Watts & S. 331.

25. *Wood, Lim.* (3d ed.) 165; § 65; *Newlin v. Duncan* (Del.) 1 Harr. 204, 25 Am. Dec. 66; *Kimmel v. Schwartz*, 1 Ill. 216; *Haley v. Jewett*, 44 Mass. 439; *Shackleford v. Douglas*, 31 Miss. 95.

should be brought upon the original cause of action,²⁶ the defense to which has been taken away. Upon a new promise,²⁷ acknowledgment,²⁸ or part payment²⁹ the statute is said to be "tolled," that is, the case is taken out of the statute and its effect as a defense no longer exists; and it starts to run again from that time for the full statutory period.³⁰ If the original cause of action was based on an oral contract, and the statute provides a shorter period for an oral contract than for a written one, a subsequent written acknowledgment of the debt will start the statute running anew for the period provided for an oral, not for a written, contract.³¹ Upon revival of a debt, a mortgage given to secure it is also revived.³²

§ 319. Statute of Limitations—Waiver. The right to rely upon the statute of limitations as a defense is a personal privilege which may be waived,¹ and it will be

A new promise does not require a new consideration but is supported by the consideration of the original contract. *Wood, Lim.* (3d ed.) 170, § 68; *English v. Walthen*, 72 Ky. 387; *Bealy v. Greenslade*, 2 *Crompt. & J.* 61.

26. *Biscoe v. Stone*, 11 Ark. 39; *Elmore v. Robinson*, 69 La. (18 La. Ann.) 651; *Egery v. Decrew*, 53 Me. 392.

27. *Lance v. Parker*, 1 Mill, 168.

28. *Wood, Lim.* (3d ed.) 207, § 74; *Munson v. Rice*, 18 Vt. 53.

29. *Wood, Lim.* (3d ed.) 265, § 105; *McGehee v. Greer*, 7 Port. 537; *Burr v. Williams*, 20 Ark. 171; *Hart v. Holly*, 18 Ga. 378; *Thorn v. Moore*, 21 Iowa, 285; *English v. Wathen*, 72 Ky. 387; *Dyer v. Walker*, 54 Me. 18; *Balcom v. Richards*, 60 Mass. 360; *Jewett v. Petit*, 4 Mich. 508; *Bridgeton v. Jones*, 34 Mo. 471; *Whipple v. Stevens*, 22 N. H. 219; *McLaren v. Martin*, 36 N. Y. 88; *Walton v. Robinson*, 27 N. Car. 341; *Glick v. Crist*, 37 Ohio St. 388; *Partlow v. Singer*, 2 *Oreg.* 307; *Turner v. Ross*, 1 R. I. 88; *Eaton v. Gillett*, 17 Wis. 435.

30. *Wood, Lim.* (3d ed.) 160, § 64; *Clark v. Brown*, 80 Minn. 361.

31. *National Co. v. San D. Co.* (Cal. 1908), 98 Pac. 64.

32. *Wood, Lim.* (3d ed.) 516, § 230; *Hough v. Bailey*, 32 Conn. 288; *Senninger v. Rowley*, 138 Iowa, 617, 18 L. R. A. N. S. 223; *Ayres v. Waite*, 64 Mass. 72; *Roddam v. Morley*, 1 DeG. & J. 1.

1. *Wood, Lim.* (3d ed.) 100, § 41.

treated as waived unless specially pleaded when suit is brought;² An executor will not be compelled, either by law or in equity, to take advantage of the statute as a defense against a claim otherwise valid.³ Some cases even regard it a duty of an executor to pay barred debts to satisfy, in his representative character, the conscience of the testator;⁴ and may pay a barred debt due to himself.⁵ However, under a statute requiring claims to be presented against the estate of a decedent within a designated time, the executor is obliged to plead the statute against claims presented after that time,⁶ even though the delay was at his request.⁷

§ 320. **Laches.** Laches⁸ is neglect to do, for an unreasonable length of time under circumstances permitting diligence, what in law should have been done. Courts of equity⁹ and of admiralty¹⁰ will refuse relief to a

2. Wood, Lim. (3d ed.) 22, § 7; Hoyer v. Pennsylvania Co., 191 N. Y. 101, 17 L. R. A. N. S. 641.

3. Wood, Lim. (3d ed.) 424, § 188; Pollard v. Seears, 28 Ala. 484; Chambers v. Fennemore (Del.), 4 Harr. 368; Semmes v. Magruder, 10 Md. 242; Barnwall v. Smith, 58 N. Car. 168; Woods v. Erwin, 141 Pa. St. 278; Walter v. Radcliffe, 2 Desauss. Eq. 577; Batson v. Murrell, 29 Tenn. 301; Tunstall v. Pollard, 38 Va. (11 Leigh) 1; Re Huger, 100 Fed. 805.

4. Scott v. Hancock, 13 Mass. 162; Byrd v. Wells, 40 Miss. 711; Hodgdon v. White, 11 N. H. 208.

5. Payne v. Pusey, 71 Ky. 564; Coates v. Coates, 33 Beav. 249.

6. Waltham B'k v. Wright, 90 Mass. 122; Wiggins v. Lovering, 9 Mo. 269; Sugar B'k v. Fairbanks, 49 N. H. 140.

7. Wood, Lim. (3d ed.) 430, § 188.

8. This word is pronounced as though spelled "lash-es," and is derived from the Norman French *lachesse* and Latin *laxus*, meaning loose or lax.

9. Vanalla v. Carr, 229 Ill. 47; Old Co. v. Casey, 104 Ky. 616, 20 Ky. Law Rep. 994, 84 Am. St. 480, 42 L. R. A. 466; Warden v. Adams, 15 Mass. 233; Mellish's Est. 1 Pars. Eq. Cas. 482; Atkinson v. Robinson, 36 Va. (9 Leigh) 393; Repub. Francaise v. Schultz v. 102 Fed. 153; Green's Case, L. R. 18 Eq. 428.

10. Benedict, Admr. (4th ed.) 344, § 515; The Tiger, 90 Fed. 826.

party who has been guilty of laches, stale demands being discouraged.¹¹ The Latin maxim is, *Vigilantibus non dormientibus aequitas subvenit*¹² (equity serves the vigilant, not those who sleep). Considerations of public policy require that litigation be not postponed until transactions have become obscured by time and evidence lost¹³ or the rights of innocent persons have intervened.¹⁴ A person does not have any right to wait for the purpose of seeing whether a transaction will be profitable before asking to have it set aside, thus throwing upon the other party all loss caused by a decline, and compelling him to share any benefit derived from a rise in value. Again, a person by not asserting rights, may induce another to believe that they are worthless or have been abandoned; and upon a change in condition or relation based upon that belief, it would be an injustice to allow such rights afterwards to be asserted.¹⁵

Courts of equity and of admiralty are not governed by the statute of limitations¹⁶ but wholly by their own practice and procedure.¹⁷ The doctrine of laches was applied by courts of equity before statutes of limitations were enacted; but since these statutes have been in force, equity by analogy¹⁸ frequently has adopted the periods

11. 2 Pomeroy, Eq. Jur. (3d ed.) 1788, § 965.

12. 1 Pomeroy, Eq. Jur. (3d ed.) 695, § 418.

13. *Codman v. Rogers*, 27 Mass. 112; *McKnight v. Taylor*, 42 U. S. 161.

14. An assignee having priority may lose it by laches as against a subsequent purchaser in good faith for value. 2 Pomeroy, Eq. Jur. (3d ed.) 1216, § 698; *Spain v. Hamilton*, 68 U. S. 604.

15. *Gallher v. Cadwell*, 145 U. S. 372.

16. *Wood, Lim.* (3d ed.) 141, § 59; 2 Pomeroy, Eq. Jur. (3d ed.) 1788, § 965.

17. *U. S. v. Miller*, 164 Fed. 444.

18. *Wood, Lim.* (3d ed.) 138, § 58; *Moon v. Baum*, 58 Ind. 194; *School Dist. v. Schreiner*, 46 Iowa, 172; *Blake v. Nelson*, 80 La. (29 La. Ann.) 245; *Harlow v. Lake Co.*, 41 Mich. 583; *Sommer v. Pacific Co.*, 4 Mo. App. 586; *Wyatt v. Sutton*, 66 Tenn. (10 Heisk.) 458.

Admiralty courts likewise follow the statute of limitations by analogy. *The Southwark*, 128 Fed. 149.

fixed by the statutes, holding delay beyond those periods to be unreasonable, especially where courts of equity and of common law have concurrent¹⁹ jurisdiction. However, the length of time indicating laches varies with the peculiar circumstances of each case;²⁰ and, in some cases, may be less than the statutory period.²¹

§ 321. Estoppel. Title may be conferred by estoppel.¹ Estoppel is the effect of the voluntary conduct of a person whereby he is precluded absolutely from asserting rights against another person who in good faith has relied upon such conduct, and has been led thereby to change his position for the worse,² and who, on his part, acquires some corresponding right.³ In mercantile and ordinary business transactions men must trust to appearances and declarations of persons because they do not have any other means of information; and if persons

19. Wood, Lim. (3d ed.) 128, § 58; *Cleveland v. Williamson*, 57 Ala. 402; *Blanchard v. Williamson*, 70 Ill. 647; *Wood v. Ford*, 29 Miss. 57; *Rowden v. Murphy* (N. J.), 20 Atl. 379; *Bidwell v. Astor Co.*, 16 N. Y. 263; *McNair v. Ragland*, 16 N. Car. 533.

In many cases it would not be proper to refuse relief in equity as long as an action could be brought at law upon the same matter; and to allow a longer time than the statute practically might repeal it. Wood, Lim. (3d ed.) 143, § 59.

20. 2 Pomeroy, Eq. Jur. (3d ed.) 1789, § 965; *Halstead v. Grinnan*, 152 U. S. 416.

21. Wood, Lim. (3d ed.) 146, § 60; *Spaulding v. Fenwell*, 70 Me. 17. Delay by a depositor in not promptly notifying his bank of a forged indorsement of the name of the payee of a check will prevent holding the bank liable for mispayment and charging checks to his account. In *McNeely Co. v. Bank of N. A.*, 221 Pa. St. 588, a delay of three months was held to be too long.

1. Title by estoppel may be regarded as one form of title by occupancy. Estoppel does not really transfer title directly; but is in the nature of a compulsory abandonment by the owner, who, in order that effect may be given to his acts or words, is not allowed to assert his title against the person who has relied on such acts or words, leaving the latter to take possession and to acquire title by occupancy of the property so abandoned.

2. *Hopper v. McWhorter*, 18 Ala. 229.

3. 2 Pomeroy, Eq. Jur. (3d ed.) 1421, § 804.

choose to make untrue statements by which others are injured, they should not be allowed to gainsay what they previously may have said.⁴ If an owner of property stands by and, without objection, knowingly permits another to deal with the property as though the latter did so rightfully, the latter being in ignorance of the real condition of title and supposing he was dealing rightfully, the owner afterwards may be estopped from asserting his rights.⁵

A person may be estopped and deprived of his property through negligence;⁶ however, estoppel does not result merely because the highest degree of care may not

4. Where a "Son of Temperance" repeatedly denied that he dealt in liquors, alleging that certain liquors were sold by another without his consent, he is estopped from claiming the liquors as against one who, in reliance on such representations, has been induced to bring suit and attachment against the apparent dealer. *Mitchell v. Reed*, 9 Cal. 204, 70 Am. Dec. 647.

5. 2 Pomeroy, Eq. Jur. (3d ed.) 1451, § 818. A chattel mortgagee, allowing the mortgaged property to be disposed of, may be estopped to reclaim it. 2 Cobbey, Chat. Mort. 1163, § 942; *Brandt v. Daniels*, 45 Ill. 453; *Davenport v. Foulke*, 68 Ind. 382, 34 Am. Rep. 265; *Miles v. Leff*, 60 Iowa, 168, 14 N. W. 233; *Abbott v. Goodwin*, 20 Me. 408; *Stafford v. Whitcomb*, 90 Mass. 518; *First B'k v. Weed*, 89 Mich. 357, *Griffin, Illus. Cas. on Pers. Prop.* 169; *Littlejohn v. Pearson*, 23 Nebr. 192; *Patrick v. Meserve*, 18 N. H. 300; *Conkling v. Shelley*, 28 N. Y. 360; *Etheridge v. Hilliard*, 100 N. Car. 250; *Flenniken v. Scruggs*, 15 S. Car. 88; *Fieid v. Doyon*, 64 Wis. 500; *National B'k v. Hamson*, 5 Q. B. D. 177.

An owner of goods may be estopped from afterwards claiming them if he induce an officer to levy upon or to attach them; *Moore v. Bowman*, 47 N. H. 494, 1 Gray, Cas. on Prop. 144; or knowingly and without objection stands by and sees them sold by execution or by judicial sale as the property of another to one buying in good faith. *Rorer, Jud. Sales* (2d ed.), 193, § 457; *Reiss v. Hanchett*, 141 Ill. 419; *Reid v. Heasley*, 41 Ky. 254; *Stiff v. Ashton*, 155 Mass. 180; *Allen v. Sales*, 56 Mo. 28; *Stephens v. Baird*, 9 Cow. 274; *Epley v. Witherow*, 7 Watts, 163; *Pickard v. Sears*, 6 A. & E. 469.

6. Carelessness in leaving room for alteration without defacing an instrument or exciting suspicion, renders the maker liable on the instrument as altered, to a holder for value without notice. *Merritt v. Boyden*, 191 Ill. 136. The same rule applies if the maker has used a pencil, thus facilitating alteration. *Siebel v. Vaughan*, 69 Ill. 257.

have been exercised.⁷ A bailor is not estopped by giving possession of goods to the bailee, even though the latter deals with the goods as his own, the act of the bailor being lawful and not negligent and he does not hold the bailee out to the world as the owner.⁸

A debtor having a defense may be estopped by not speaking when he ought.⁹ If the defendant in a suit has a good defense which he does not assert therein but allows judgment to be entered, he afterwards will not be allowed to set up such defense.

Estoppels are said to be odious¹⁰ and are "only applied to promote justice and fair dealing, never to aid a fraudulent purpose." There must be a representation or a concealment of material facts known¹¹ to the person estopped and unknown¹² to the person relying thereon; and there must have been at least an expectation that the conduct would be relied upon by the other party.¹³ There cannot be estoppel where there is no mut-

7. The holder of a negotiable instrument indorsed in blank, is not bound to take any measure of special precaution in regard to it and to convert the indorsement into a special one by making it payable to his own order in anticipation of losing it. He has no more reason to suppose he would lose it than a man has to think his horse will be stolen and to keep it under lock and key at all times. Besides, he might not wish to incur the liability of an indorser. *Biddle v. Bayard*, 13 Pa. St. 150.

8. *Saltus v. Everett*, 20 Wend. 267, 13 N. Y. Com. Law, 350.

9. 2 Pomeroy, Eq. Jur. (3d ed.) 1453, § 820; *Old B'k v. Exchange B'k*, 50 Wash. 418. Where a person about to purchase a promissory note, asked the maker if it was all right, and the maker replied that it was, the maker will not be allowed to set up the defense against such indorsee that the note is void having been given for money won on a wager. *Pritchett v. Ahrens*, 26 Ind. App. 56.

10. *Mitchell v. Reed*, 9 Cal. 204, 70 Am. Dec. 647; *Rhodes v. Childs*, 64 Pa. St. 18.

11. The owner of a trade-mark is not estopped by his silence where he is ignorant of expenditures being made by another in reliance by the latter on a supposed right to such trade-mark. *Portuondo Co. v. Portuondo Co.* (Pa. 1908), 70 Atl. 968.

12. *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787.

13. 2 Pomeroy, Eq. Jur. (3d ed.) 1423, § 805. Fraud, however, is not essential. 2 Pomeroy, Eq. Jur. (3d ed.) 1424, § 805.

uality or privity;¹⁴ and a person is not estopped as to persons to whom a representation is not made.¹⁵

§ 322. **Failure of Defense—Recovery in Trover—Imprisonment.** There are a number of other methods, a few of which will be briefly mentioned here, by which a transfer by operation of law is effected. If a person when sued fails to enter his appearance, or to file proper pleadings, or to urge his defense,¹ or neglects or is unable to produce his evidence, or his witnesses are incompetent or testify falsely, it may result in a judgment being entered against him which otherwise could not have been obtained, thus causing a right to spring up in the plaintiff to which morally he is not entitled; or a similar result would follow if a party neglects to appeal when he has good grounds for doing so. A defendant failing to set up the defenses of infancy, bankruptcy,² the statute of limitations, or the statute of frauds in the lower court, will be deemed to have waived them; and will not be allowed to urge them for the first time on appeal.

A recovery³ in trover⁴ for the conversion of an arti-

There is no estoppel if what was said did not mislead. *Rhodes v. Childs*, 64 Pa. St. 18.

14. Where money was deposited in a bank "as trustee for" a third person, but the money belonged to the depositor who was not under any obligation to such third person, neither the bank nor the depositor is estopped to deny the right of such third person to the deposit. *Brabrook v. Boston B'k*, 104 Mass. 228, 6 Am. Rep. 222.

15. *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787.

1. *Ithaca v. Ithaca Co.*, 130 N. Y. Supp. 359.

2. *Brandenburg*, Bankr. (3d ed.) 290, § 447.

3. **Compromising a suit does not transfer property.** Thus, settling a suit for trespass to land does not transfer timber cut down by the trespasser. *Betts v. Lee*, 5 Johns. 343, 4 Am. Dec. 368, *Pattee*, Illus. Cas. in *Personalty*, 118.

4. A judgment for damages which does not relate to specific chattels, does not transfer the ownership of the latter. Thus, a suit in trespass *quære clausum fregit* for cutting timber does not transfer title to charcoal made therefrom, which was in the possession of the landowner. *Curtis v. Groat*, 6 Johns. 168, 4 N. Y. Com. Law, 83, 5 Am. Dec. 204.

cle, followed by a satisfaction ⁵ of the judgment, operates to transfer the title in the converted article to the defendant, such title taking effect by relation from the date of the conversion.⁶ The Latin maxim is, *Solutio pretii emptionis loco habetur* (the payment of the price stands in the place of a sale).

The old common law allowed imprisonment for debt, and this rule exists in a modified form in a few of the states, the statutes therein sometimes providing that a debtor during his imprisonment cancels his indebtedness at a fixed rate per day, the result being that if the imprisonment continues long enough the indebtedness will become extinguished, thereby terminating the right of the creditor to enforce it in the ordinary way, and the prisoner acquiring a corresponding benefit.

5. *Spivey v. Morris*, 18 Ala. 254, 52 Am. Dec. 224, *Pattee, Illus. Cas. in Personalty*, 191; *Hopkins v. Horsey*, 20 Me. 449; *Hepbur v. Seawell*, 5 Harr. & J. 211; *Ortertront v. Roberts*, 8 Cow. 48; *Sanderson v. Caldwell*, 2 Aik. 195.

In several states a judgment in trover passes title to the property without satisfaction. *Wright v. Walton*, 3 N. Car. 16; *Floyd v. Browne*, 1 Rawle, 121, 4 Rawle, 285. The situation is regarded as analogous to taking a note in payment, the plaintiff trusting to the credit of the defendant. *Rogers v. Moore, Rice* (18 S. Car. Law), 60.

6. Where A. wrongfully carried away posts belonging to B., and B., having recovered a judgment against A. for such conversion, retook the posts before the judgment was paid, A., after payment of the judgment, can maintain an action of trespass against B.; for as soon as A. paid the judgment the posts became his, not from the time of payment but from the time he originally carried them away, so that the posts which B. took were not his own but belonged to A., and B. committed a trespass by taking them without the consent of A. *Smith v. Smith*, 11 N. H. 571, 1 Gray, *Cas. on Prop.* 164, *Pattee, Illus. Cas. in Personalty*, 189, *Lawson, Cas. on Pers. Prop.* 319.

CHAPTER XL

HOW PROPERTY CEASES TO EXIST.

§ 323. **Destruction of Tangible Articles.** Having discussed the methods by which property comes into existence and how it may be transferred, it now remains to show how it ceases to exist; and, in treating of this division of the subject, it will be necessary again to refer to the two meanings of the word "property"—that is, "things owned" and "ownership of things."

In the sense of "things owned," personal property may cease to be such by annexation to, and thus becoming, realty; but this already has received treatment under the head of "Fixtures," and does not require further mention here.

Personal property may cease to exist, or at least to have any value, by its destruction,¹ which may result from accident, or from intention through human agency. Property may be destroyed by fire, by decay,² or by death. Property may be destroyed, so far as utility or value is concerned, by being placed beyond reach, as in the case of a vessel sinking at sea, or of property washed away by a flood or blown away by a tornado. Some kinds of property are destroyed by putting them to the use for which they were intended, as food or fuel by its con-

1. The accidental destruction of the written evidence of a liability does not remove the obligations of the parties thereto. The destruction of bank-notes by fire does not destroy the obligation to pay; but the evidence of such destruction must be very strong and conclusive. *Wade v. New O. Co.*, 47 La. (8 Rob.) 140, 41 Am. Dec. 296.

2. See *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 297, *Pattee*, Illus. Cas. in *Personalty*, 125, 138.

sumption. While, as a general rule, the intentional or negligent destruction of property of another gives rise to an action for damages against the person whose act has caused the destruction, or to a claim for compensation, there are several instances in which the property of another may be destroyed without any liability being incurred by the person causing its destruction, as by exercise of the police power, under the law of necessity, in abating a nuisance, or from some other deliberate lawful act; and these now will be considered.

§ 324. **Destruction—Police Power.** The Police Power of a state not only can regulate the use of property, but it can do more; for, by its exercise, private property can be destroyed ² summarily ⁴ without notice,⁵ and, unless compensation is allowed by statute,⁶ without reimbursement.⁷

§ 325. **Police Power—Distinctions.** While police power resembles the right of eminent domain in that each is exercised for the public good, it will be noticed that there are two important distinctions. Private property is taken under eminent domain proceedings because useful ⁸ to the public, but under police power because detrimental ⁹ to the public; under eminent domain proceed-

2. *Mullen v. Mosely*, 13 Idaho, 457, 121 Am. St. 277, 12 L. R. A. N. S. 394.

4. *Ross v. Desha*, 83 Ark. 176, 31 L. R. A. N. S. 699; *Miller v. Horton*, 152 Mass. 540, 23 Am. St. 850, 10 L. R. A. 116; *People v. Board*, 140 N. Y. 1, 37 Am. St. 522, 23 L. R. A. 481; *North Co. v. Chicago*, 211 U. S. 306.

5. *Freund*, Pol. Pow. 554, § 521.

6. *Safford v. Board*, 110 Mich. 81, 64 Am. St. 332, 2 Detroit Leg. N. 314, 23 L. R. A. 300.

7. *Kirkland v. State*, 72 Ark. 171, 105 Am. St. 25, 65 L. R. A. 76; *New Orleans v. Charouleau*, 121 La. 890, 126 Am. St. 332. The individual hardships occasioned by its exercise are compensated by the common benefits obtained. *Com. v. Alger*, 61 Mass. 53, 86.

8. *Freund*, Pol. Pow. 546, § 511.

9. *Davidson v. New Orleans*, 96 U. S. 97.

ings compensation is requisite, while under a proper exercise of the police power the owner of the property is remediless.¹⁰

§ 326. Police Power—Unreasonable Exercise. Police regulations, however, must not be unconstitutional or unreasonable, nor must they discriminate. If property is destroyed through an improper¹ exercise of the police power, its owner can maintain an action² for damages against those who have destroyed it, unless such loss has resulted indirectly.³

§ 327. Police Power—Purpose. The benefits to the public through exercise of the police power take many forms, among others being protection of life and property, preservation of health, and upholding the morals of the community. An article may be dangerous because at present offensive or because it may produce a public calamity.⁴ Sometimes, under an exercise of the police

10. Freund, Pol. Pow. 547, § 511; *Chicago v. Bowman Co.*, 224 Ill. 294, 123 Am. St. 100, 17 L. R. A. N. S. 684.

1. *North Co. v. Chicago*, 211 U. S. 306. A law authorizing the killing of animals infected with certain diseases does not authorize the killing of horses not so infected. *Miller v. Horton*, 152 Mass. 540, 23 Am. St. 850, 10 L. R. A. 116.

The burden is on those destroying property to justify their act. Freund, Pol. Pow. 554, § 521.

2. For this reason the provision of the U. S. Const. Amend., Art. XIV, § 1, that a person shall not be deprived of property without due process of law is not violated. *Miller v. Horton*, 152 Mass. 540, 23 Am. St. 850, 10 L. R. A. 116; *People v. Board*, 140 N. Y. 1, 37 Am. St. 522, 23 L. R. A. 481; *North Co. v. Chicago*, 211 U. S. 306.

3. A county is not liable for loss of crops by reason of the owner being quarantined by the local board of health on the erroneous supposition that there was smallpox in the family. *Beeks v. Dickinson*, 131 Iowa, 244, 6 L. R. A. N. S. 831.

4. In the exercise of the police power, the following may be seized and destroyed: decayed and impure food; *North Am. Co. v. Chicago*, 211 U. S. 306; liquors; *Kirkland v. State*, 72 Ark. 171, 105 Am. St. 25, 65 L. R. A. 76; *State v. Liquors* (Me. 1908), 71 Atl. 758; infected bedding, clothing and furniture. *Safford v. Board*, 110 Mich. 81, 64 Am. St. 332, 3 Detroit Leg. N. 214, 33 L. R. A. 300.

power, property may not actually be destroyed but its value is entirely or almost entirely taken away so that in effect it is destroyed.⁵

§ 323. **Destruction—Necessity.** Property may be destroyed from Necessity without any liability to its owner being incurred.¹ It might seem at first that destruction from necessity is the same as destruction through an exercise of the police power, that too in many cases being

Dogs, when mad, may be killed. No kind of property over which the exercise of the power is more frequent and necessary than dogs. Even in a state of domestication they never wholly lose their wild natures and destructive instincts and are dangerous to persons and to other animals. *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94. Dogs constitute a peculiar kind of property; they increase rapidly, are of little expense to their owners, and retain a considerable degree of their wild, ferocious natures. It often is impossible for an owner to prevent trespasses; and, when mischief is done, it is impossible to identify the owner, or, when found, he is as irresponsible as the dog. An ordinance authorizing the killing of an unregistered dog is valid. *Jenkins v. Ballentyne*, 8 Utah, 245, 16 L. R. A. 689. Dogs used for unlawful hunting may be killed. *Edson v. Crangle*, 62 Ohio St. 49. Animals infected with a contagious disease may be killed. *New Orleans v. Charouleau*, 121 La. 890, 126 Am. St. 332. Hogs may be killed to protect weakening levees. *Ross v. Desha*, 83 Ark. 176, 21 L. R. A. N. S. 699.

Obscene publications; *Com. v. Buckley*, (Mass. 1909) 86 N. E. 910; concealed weapons; *McConathy v. Deck*, 34 Colo. 481, 4 L. R. A. N. S. 358; short measures, gambling devices; *Mullen v. Mosely*, 13 Idaho, 457, 121 Am. St. 277, 12 L. R. A. N. S. 394; and counterfeit money and the tools and implements for making it; 26 U. S. Stat. L. 742; can be confiscated. *Freund*, Pol. Pow. 554, § 520.

5. The sale of intoxicating liquors may be prohibited by law, thus rendering a lease, bar fixtures and the stock in trade a dead loss to the proprietor of a saloon. *O'Byrne v. Henley* (Ala.), 50 So. 83; *People v. McBride*, 234 Ill. 146. Flag legislation may prevent the further use of a valuable trademark. *Halter v. State*, 74 Nebr. 757, 121 Am. St. 754, 7 L. R. A. N. S. 1079. Deer-meat cannot be sold in the close season although brought from another state. *Ex parte Maler*, 103 Cal. 476, 42 Am. St. 129. Bottles on hand when an ordinance goes into effect requiring name and capacity to be blown thereon, may be rendered useless. *Chicago v. Bowman Co.*, 234 Ill. 294, 123 Am. St. 100, 17 L. R. A. N. S. 684.

1. *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190.

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based on necessity; but there are some distinctions between police power and necessity in the technical sense here used. Necessity is urgent, demanding immediate action;² the exercise of the police power in most cases can be more or less deliberate. Police power is vested in the state, arises from the laws of society, and usually is exercised by virtue of some statute or ordinance, which can be repealed; necessity is vested in the individual,³ arises under the laws of nature,⁴ which are older than the laws of society and which the government cannot take away. It is the law of self-preservation, bearing the same relation to property as homicide in self-defense does to life. The method of its exercise varies according to circumstances and cannot be determined in advance. The necessity, however, must be shown clearly.

Necessity justifies the destruction of property to prevent spread of a conflagration; and if, in the exigency of the case, there is an imperative duty to destroy buildings, liability does not ensue though goods⁵ therein are unavoidably and necessarily destroyed; nor is there any liability for property thrown overboard in a storm at sea, for the purpose of saving life⁶ or other property.

A dog may be killed in defense of property.⁷ Noisy⁸ or dangerous⁹ dogs may be killed by anyone as a nui-

2. The Latin maxim is, *lex necessitatis est lex temporis, id est, instantis* (the law of necessity is the law of the time, that is, of the present moment).

3. *American W'ks v. Lawrence*, 23 N. J. L. 590, 57 Am. Dec. 420, Lawson, Cas. on Pers. Prop. 76.

4. *Surocco v. Geary*, 3 Cal. 69, 58 Am. Dec. 385.

5. *American W'ks v. Lawrence*, 23 N. J. L. 590, 57 Am. Dec. 420, Lawson, Cas. on Pers. Prop. 76.

6. *Mause's Case*, 12 Coke, 63.

7. *State v. Churchill* (Idaho, 1909), 98 Pac. 853; *Dunning v. Bird*, 24 Ill. App. 270.

8. *Hubbard v. Preston*, 90 Mich. 221, 30 Am. St. 426, 15 L. R. A. 249.

9. *Putnam v. Payne*, 13 Johns. 312, 5 N. Y. Com. Law, 99. A person may kill a dog attacking him on a highway though the animal

sance; in which case, in order to escape liability, it is not necessary that the act be in self-defense.¹⁰

§ 329. Destruction—War—Collision at Sea. In time of war, property may be destroyed or temporarily used by the public enemy or by friendly military forces, without any legal right to compensation therefor¹¹ except as the sovereign power may choose to allow it. After war has been declared between two countries, each resident of one country theoretically is supposed to be at war with each resident of the other; and, under this theory, a citizen of this country, if a resident of the country with which this country is at war, may be deprived of his property, at least until the restoration of peace.

The liability¹² of the owner of a vessel for embezzlement, loss or destruction of property or for injury by collision without his privity or knowledge, cannot exceed the amount or value of his interest in the vessel and pending freight.¹³ From this it results that if the property so destroyed exceeds in value the interest of the shipowner and freight, the owner of the property loses the excess without compensation.

§ 330. Abandonment. As property in the sense of "ownership," can be acquired by occupancy, so it can be lost by Abandonment,¹ which is relinquishment of

is not accustomed to attack persons. *Reynolds v. Phillips*, 13 Ill. App. 557.

10. *Brown v. Carpenter*, 26 Vt. 638.

11. *Juragua Co. v. U. S.*, 212 U. S. 297, 53 L. ed. 520, 41 Chl. Leg. N. 249.

12. U. S. Rev. St. § 4283 (Act of Mar. 3, 1851, ch. 43, 9 Stat. L. 635); 4 Fed. St. Ann. 839; *Benedict, Admir.* (4th ed.) 347; *Liverpool Co. v. Phenix Co.*, 129 U. S. 440.

13. *Sumner v. Caswell*, 20 Fed. 253.

1. *M'Goon v. Ankeny*, 11 Ill. 558. Property is fish actually appropriated and manucaption made, is lost by voluntarily placing them in an arm of a river [the Patuxent] where the tide ebbs and flows, though fenced in so that they cannot escape to the river. *Sollers v. Sollers*, 77 Md. 148, 39 Am. St. 404, 20 L. R. A. 94.

ownership with an intention not to reclaim² it or not to make a transfer to another, thus leaving it to be acquired by any person who subsequently may choose to assert title by occupancy.³ As human beings ordinarily do not

Manure on a public highway may be considered as immediately abandoned. *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 351, *Pattee, Illus. Cas. in Personality*, 75, *Lawson, Cas. on Pers. Prop.* 174.

2. *Nolan Co. v. Nolan*, 131 Cal. 271, 82 Am. St. 346, 53 L. R. A. 384; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94. Hides placed in vats by the owner of a tannery 40 or 50 years previously, are not abandoned, though the tannery afterwards is sold. "Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect. Here the act was one of preservation—the proprietor expending labor upon his property thereby to enhance its value. It was an act which excludes the very idea of abandonment." *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600, *Pattee, Illus. Cas. in Personality*, 81, *Lawson, Cas. on Pers. Prop.* 185. A jettison is not an abandonment. *Case v. Reilly* (U. S.), 3 Wash. 302. Oysters planted where none grew naturally, by a person designating the spot and intending to improve them for ulterior use, are not abandoned. *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 847; *Fleet v. Hegeman*, 14 Wend. 42, 12 N. Y. Com. Law, 531, *Lawson, Cas. on Pers. Prop.* 101. A chain is not abandoned by finders because, while trying to remove the gravel in which a portion is embedded, they are called away to work. *Lawrence v. Buck*, 62 Me. 275. Logs which have been placed in a stream to be floated but which have gone to the bottom, becoming water-soaked and heavy, are not abandoned although the marks thereon are obliterated, especially if efforts are made each year by the owners of the logs to recover them. *Whitman v. Muskegon Co.*, 152 Mich. 645. Where gold-bearing quartz in a sack is deposited in the earth, and marks are made on the nearest tree to aid in its location, it is not abandoned. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477. Tallow melted by the burning of the warehouse in which it is stored, and flowing into a river, is not abandoned. *Buckley v. Gross*, 32 L. J. Q. B. 129, 3 Best & Smith (113 Eng. Com. Law), 566, 7 L. T. 743, 11 W. R. 465, 9 Jur. N. S. 986.

3. As in the case of money in a wrecked schooner which went to the bottom of Lake Erie in 60 feet of water six miles from shore, November, 1835, and raised in August, 1836; *Wyman v. Hurlbut*, 12 Ohio, 81, 40 Am. Dec. 461; tailings from a mine; *Dougherty v. Creary*, 30 Cal. 290, 39 Am. Dec. 116; a trade-mark; *Hopkins, Tradem.* (2d ed.) 177; *Gaines v. Whyte*, (Mo. App. 1904) 81 S. W. 648; *Menendez v. Holt*, 128 U. S. 514; and a tradename. *Cohen v. Nagle*, 190 Mass. 4, 3 L. R. A. N. S. 964.

part with ownership without the receipt of some benefit in return, especially of an article possessing value, in a dispute between a former owner of property and one claiming title thereto by subsequent occupancy, the claim of abandonment is not favored by the courts,⁴ the burden of establishing it being on the person affirming it⁵ and the proof must be clear.⁶ The question of abandonment very frequently arises in regard to copyrights, trade-marks,⁷ and tradenames.⁸

A mere intangible right against a third person, even though evidenced in writing, cannot be lost by mere abandonment so as to enable a third person to acquire any right against the party liable.⁹

§ 331. Property Lost—Strayed—Mislaidd—Concealed—Unclaimed—Wrecks—Derelicts—Definitions. Lost property, in the legal sense, is such as has passed from the actual possession of the person entitled thereto, with-

4. *Taylor v. Carpenter*, 2 Woodb. & M. 1.

5. *Julian v. Hoosier Co.*, 78 Ind. 408.

6. *Nolan Co. v. Nolan*, 131 Cal. 271, 82 Am. St. 346, 53 L. R. A. 384; *Sohl v. Geisendorf*, Wils. 60.

If an intention to abandon is clearly shown, it is immaterial how much time may elapse between abandonment and subsequent occupancy by another, though great length of time may be evidence of an intention to abandon. *Burt v. Tucker*, 178 Mass. 493, 52 L. R. A. 112; *Gillett v. Lumsden*, 4 Ont. Law Rep. 300.

In one case, disuse of a trademark for 20 years was not alone sufficient to show abandonment. *Gillott v. Esterbrook*, 48 N. Y. 374.

7. *Hopkins, Tradem.* (2d ed.) 176; *Julian v. Hoosier Co.*, 78 Ind. 408; *Gaines v. Whyte*, (Mo. App. 1904) 81 S. W. 648; *Blackwell v. Dibrell*, 3 Hughes, 151.

A trademark is not abandoned merely because the manufacturer, being burned out, works as a salesman four years without using it. *Burt v. Tucker*, 178 Mass. 493, 86 Am. St. 499, 52 L. R. A. 112.

8. *Cohen v. Nagle*, 190 Mass. 4, 2 L. R. A. N. S. 964.

9. While a promissory note can be transferred by the holder either for value or as a gift, it cannot be abandoned so that a third person can acquire a title which can be asserted against the maker. If the holder resolves not to enforce the note, it practically might amount to a gift to the maker, but not an abandonment.

out his knowledge and contrary to his intention, and which has not passed at once into the possession of another, and whose location within definite limits is unknown to the owner. As long as a person knows where his property is, or can regain it whenever he desires to do so provided its location has not been disturbed by others, it is not lost even though he is not in actual possession and may not be able to state at once exactly where it is. He has constructive possession even though it is not where he thinks it is, if, upon going where he supposes it to be, its exact location easily could be ascertained.¹

An Estray² is a valuable³ animal *domitae naturae*, which has wandered away from the person entitled to its possession.

Mislaid⁴ property is such as has been deposited by a person in some place, but not in the actual possession of another, with the intention of retaking possession before leaving the locality but which is not done; or with an intention of returning later, but the depositor either forgets where he has placed the property, or the entire circumstance passes from his mind.

Treasure Trove⁵ is money, coin, gold, silver, plate or

1. A watch blown from a window by an explosion of gunpowder is not lost; for if the owner had gone where he left it he would not have had any difficulty in locating it. *Pritchett v. State*, 34 Tenn. 285, 62 Am. Dec. 468. Lumber accidentally gone adrift in a river is not lost if pursuit is made at once by the owner.

2. *Kinney v. Roe*, 70 Iowa, 509. On great cattle ranges, an animal without the brand of its owner is known as a "maverick." This term originated from a presumption, some years ago, that such cattle belonged to Samuel Maverick, a Texas cattle raiser.

3. 1 Blacks. Comm. 298.

4. Sometimes designated as "deposited" property, or property "left."

5. From the French, *trouver*, to find. 1 Blacks. Comm. 295. The law of treasure trove is not so important in this country and at the present time as it was under the old English common law. When the Romans and others were driven from England by northern invaders,

bullion found hidden in the earth or in some other private place, with an intention on the part of the owner, who is unknown,⁶ to return for it later and to recover it. To constitute treasure trove, there must be a hiding, secrecy, and an unknown owner.⁷ Under the old English common law treasure trove was confined to the precious metals and things manufactured or coined therefrom; but in our commercial day it might include the paper representations⁸ of gold and silver. Money found in a stove⁹ has been held to be treasure trove; but otherwise as to gold-bearing quartz,¹⁰ even though three-quarters gold, hidden in the earth.

Unclaimed property is that, the delivery of which for some reason, was not demanded from a bailee by the time it was expected such demand would be made.¹¹

A Wreck is the cargo cast by the sea upon the land from a ship lost at sea. Technically a wreck does not occur so long as nothing is cast upon the shore;¹² if the

it was quite common for them to conceal their money under ground with a view of resorting to it again when the invaders in turn should be driven away; but this not happening, such treasures never were reclaimed, and the finding thereof was not uncommon at the time the common law was in process of evolution.

6. *Danielson v. Roberts*, 44 Oreg. 108, 102 Am. St. 627, 65 L. R. A. 526.

7. *Sovern v. Yoran*, 16 Oreg. 269, 8 Am. St. 293. Hides placed in vats forty or fifty years ago for tanning, are not treasure trove. All the elements are wanting. They are not gold or silver, there was no hiding, no secrecy, the owner is known, and they were not placed in the vats for concealment. *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600, *Pattee, Illus. Cas. in Personalty*, 81, *Lawson, Cas. on Pers. Prop.* 185.

8. *Huthmacher v. Harris's Adm'rs*, 38 Pa. St. 491, 80 Am. Dec. 502, *Pattee, Illus. Cas. in Personalty*, 78, *Lawson, Cas. on Pers. Prop.* 177.

9. *Kuykendall v. Fisher*, 61 W. Va. 87, 3 L. R. A. N. S. 94.

10. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477.

11. Unclaimed property may also be abandoned, either voluntarily or from necessity. *Malone v. Provident Inst. (Mass. 1909)*, 86 N. E. 912.

12. 1 Black. Comm. 291.

goods continue at sea they are known as Jetsam, Flotsam, or Ligan. Jetsam is where goods are cast into the sea, and sink and remain under water; flotsam where they continue floating upon the surface of the waves; and ligan where they are sunk into the sea, but tied to a cork or buoy in order to be found again.¹³

A Derelict is a vessel entirely abandoned at sea¹⁴ without any definite intention of returning to it or any prospect of recovering it¹⁵ other than a vague¹⁶ intention of returning to it if opportunity occurs. A vessel may be a derelict though anchored;¹⁷ and, on the other hand, a vessel accidentally becoming loose without anyone on board is not necessarily a derelict.¹⁸

§ 332. Distinctions—Lost and Mislaid—Lost and Abandoned—Found Property and Treasure Trove—Mislaid and Unclaimed—Stolen Property. Lost property, in the popular¹ meaning of the term, includes mislaid and stolen property, wrecks, and also some articles which, in contemplation of law, have ceased to exist although not actually so, as artificial teeth accidentally dropped overboard in mid-ocean; but in law these various terms are distinguished.

There is a distinction² between mislaid and lost prop-

13. Goods jetsam, flotsam, and ligan are not abandoned, especially things ligan, as the owner has done all in his power to assert and to retain his property. 1 Blacks. Comm. 292.

14. *Baker v. Hoag*, 7 N. Y. 555.

15. *Fisher v. The Sybil*, 5 Hughes, 61, *aff'd* 17 U. S. 98; *The Clarissa*, Swab. 129.

16. *The Fairfield*, 30 Fed. 700; *Coromandel*, Swab. 208.

17. *The Laura*, 81 U. S. 336.

18. *The Ontario*, 8 Ben. 500; *The Zeta*, L. R. 4 A. & E. 460.

1. An article is not regarded as lost merely because an owner speaks of it as "lost" if, legally, it was mislaid. *State v. McCann*, 19 Mo. 249.

2. *Griggs v. State*, 58 Ala. 424, 29 Am. Rep. 762; *McAvoy v. Medina*, 93 Mass. 548, 87 Am. Dec. 733, 1 Gray, Cas. on Prop. 378, *Pattee, Illus. Cas. in Personalty*, 378, *Van Zile, Cas. on Personalty*, 78; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94.

erty, mislaid property involving intention³ and forgetfulness,⁴ while loss is unintentional⁵ and associated with carelessness⁶ or accident. Loss, however, is not evidence of culpable carelessness,⁷ as a person is not bound to use more than ordinary diligence in regard to his property. An article may be lost as the result of natural forces, such as a flood; thus a log placed in the river to be floated down stream but deposited by the current on the land of another, is lost, not mislaid.⁸ In determining whether an article was lost or mislaid, the place⁹ and conditions¹⁰ under which it is found frequently are conclusive; but in case of doubt the presumption¹¹ is that it was lost. A pocket-book left on a desk in a bank might be presumed to have been mislaid,¹² while a pocket-book on the floor might be presumed to have been lost, as persons usually do not deposit pocket-books upon the floor;¹³ on the other

3. *Lawrence v. State*, 20 Tenn. 228, 34 Am. Dec. 644. Hides left in a vat through carelessness and forgotten are not lost. *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600, Pattee, Illus. Cas. in Personalty, 81, *Lawson, Cas. on Pers. Prop.* 185.

4. *Loucks v. Gallogly* (N. Y.), 1 Misc. 22.

5. *Danielson v. Roberts*, 44 Ore. 108, 102 Am. St. 627, 65 L. R. A. 526.

6. *Garvin v. Wiswell*, 83 Ill. 215.

7. *Biddle v. Bayard*, 13 Pa. St. 150.

8. *Deaderick v. Oulds*, 86 Tenn. 14.

9. *Loucks v. Gallogly* (N. Y.), 1 Misc. 22; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94.

10. *Ferguson v. Ray*, 44 Ore. 557, 1 L. R. A. N. S. 477. Money in an old safe, accidentally pushed back of the wooden lining through a crack therein, is lost rather than deposited and forgotten. *Durfee v. Jones*, 11 R. I. 538, 23 Am. Rep. 528, 1 Gray, *Cas. on Prop.* 380; *Lawson, Cas. on Pers. Prop.* 182.

11. *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94.

12. *Kincaid v. Eaton*, 98 Mass. 139, 93 Am. Dec. 142. A purse laid on a counter in a store and left is not lost; *State v. McCann*, 19 Mo. 249; nor is a pocket-book laid on a table in a barber-shop and left. *Lawrence v. State*, 20 Tenn. 228, 34 Am. Dec. 644.

A pocket-book containing one hundred dollars, on the seat of a railway-car after all of the passengers have left, no doubt is accidentally left. *Tatum v. Sharpless*, 6 Phila. 18, 22 Leg. Intel. 244.

13. *Loucks v. Gallogly* (N. Y.), 1 Misc. 22.

hand, a suit-case upon the floor might be presumed to have been mislaid, that is, placed there intentionally and temporarily forgotten.

Lost property is distinguished from abandoned property in that a loser does not part with his ownership; and parting with possession is unintentional.¹⁴ There is a *prima facie* presumption that articles found upon the surface of the earth are abandoned;¹⁵ but this presumption is very slight and may be overcome by the character of the property and by the circumstances¹⁶ under which it is found, as well as by direct proof.¹⁷

There is also a distinction¹⁸ between lost property and treasure trove in that the former is usually upon the surface¹⁹ and parting with possession was involuntary, while treasure trove is intentionally hidden or secreted, so that the presumption of abandonment is lacking.²⁰

Unclaimed resembles mislaid property in that each was intentionally placed where it is; but there is this distinction, that in the case of unclaimed property an actual bailment was intended by both parties, while in the case of mislaid property it was otherwise.

14. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477.

15. 2 Blacks. Comm. 402.

16. Such presumption or inference does not obtain as to property intentionally left or deposited in a designated place and possibly forgotten for the time being. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477.

17. *New York Co. v. Haws*, 56 N. Y. 175.

18. *Sovern v. Yoran*, 16 Oreg. 269, 8 Am. St. 293. In this country the law relating to treasure trove has been merged into the law of the finder of lost property. *Danielson v. Roberts*, 44 Oreg. 108, 102 Am. St. 627, 65 L. R. A. 526.

19. *Danielson v. Roberts*, 44 Oreg. 108, 102 Am. St. 627, 65 L. R. A. 526.

20. 2 Blacks. Comm. 9. Where gold bearing quartz in a sack is found imbedded in the earth and there are marks on trees near by apparently made to aid in locating the property, the presumption that it was lost, which attends property found on the surface, is wanting. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477.

The term "found" is correlative to "lost;" and property not technically lost is not found, in the legal sense, but, more properly, discovered; in popular language, however, the discoverer of mislaid or of abandoned property and the like is called a "finder." Stolen property is not technically lost though in real life the effect upon the owner is very much the same. In contemplation of law a thief is a *quasi*-bailee under a duty to restore²¹ the stolen property to the owner, whose title is not affected by the theft²² and who can reclaim his property wherever he finds it;²³ but as against everyone but the true owner, a thief can maintain an action²⁴ for any interference with his possession.

§ 333. **Rights of Finder—Possession.** To constitute one a finder so as to enable him to acquire any rights over lost property he must take possession; but such possession as the article admits will suffice.¹ A person seeing lost property is not under any legal obligation to take it into his possession, however great his moral obligation to do so may be, and he is not liable to the owner though such article subsequently be injured or destroyed on account of his failure to take charge of it.

One taking possession of a lost article is a *quasi*-bailee.²

21. Under the English common law, goods thrown away by a thief in his flight were known as "*waifs*" (*bona wavata* goods waved). 1 Blacks. Comm. 296.

22. *Railway Co. v. Hutchins*, 32 Ohio St. 571, 1 Gray, Cas. on Prop. 96.

23. 2 Blacks. Comm. 449.

24. *Wincher v. Shrewsbury*, 3 Ill. 283, 35 Am. Dec. 108.

1. Dragging a chain to shoal water and coiling it up at one end, the other being imbedded in the sand, is sufficient. *Lawrence v. Buck*, 62 Me. 275.

2. *Peoria Co. v. McIntire*, 39 Ill. 298; *Tancil v. Seaton*, 69 Va. (28 Gratt.) 601, 24 Va. Rep. Ann. 192, 26 Am. Rep. 380; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94.

A finder has a special property in the lost article. *Brandon v. Planters B'k*, 1 Stew. 320, 18 Am. Dec. 48; *Ellery v. Cunningham*, 42 Mass. 112; *Tatum v. Sharpless*, 6 Phila. 18, 22 Leg. Int. 244.

While a finder is under a duty to ascertain the owner of the article found,³ there is no obligation to expend time or money in searching for him if the finder does not have any means of knowing who the owner is,⁴ though the ownership of a lost article and the right of possession remain in the loser.⁵ A finder or anyone in possession through him,⁶ wrongfully refusing to re-deliver the property when claimed by one entitled to its possession, is liable to a civil action⁷ unless the person in possession has claimed ownership and the statute of limitations prevents recovery. An exception to this rule is money and negotiable instruments passing by delivery, which cannot be taken from the person in possession if he has acquired them in good faith and for value.⁸ The owner also can recover damages from one not in possession, to the extent of the value of a lost article if the latter once had possession,⁹ unless he never asserted any right or title in himself and has disposed of the article as he thinks the law required him to do;¹⁰ nor can a finder

3. *Wood v. Pierson*, 45 Mich. 313, *Pattee, Illus. Cas. on Personality*, 59, *Lawson, Cas. on Pers. Prop.* 194, *Van Zile, Illus. Cas. in Personality*, 82.

4. *Brooks v. State*, 35 Ohio St. 46.

5. *Allen v. State*, 91 Ala. 19, 24 Am. St. 856; *Whitman v. Muskegon Co.*, 152 Mich. 645, 20 L. R. A. N. S. 984; *Gardner v. 29 Coins*, 111 Fed. 552.

The same rule applies to an estray; *Hyde v. Prior*, 13 Ill. 64; *Nance v. Metcalf*, 19 Mo. App. 183; and to treasure trove. *Sovern v. Yoran*, 16 Oreg. 269, 8 Am. St. 293.

6. The owner can reclaim a lost article without making any reimbursement, from one to whom the finder has pledged it. *Amory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316. This is an application of the maxim that, as between two innocent persons, the one having the legal title will prevail. *Biddle v. Bayard*, 13 Pa. St. 150.

7. *Adkins v. Blake's Adm'rs*, 25 Ky. 40; *Ryan v. Chown*, 160 Mich. 204, 17 Detroit Leg. N. 26; *Porter v. State*, 8 Tenn. 225.

8. *Garvin v. Wiswell*, 83 Ill. 215.

9. A finder is liable for misdelivery to one not the owner. See *Wood v. Pierson*, 45 Mich. 313, *Pattee, Illus. Cas. in Personality*, 59, *Lawson, Cas. on Pers. Prop.* 194, *Van Zile, Illus. Cas. in Personality*, 82.

10. *Sovern v. Yoran*, 16 Oreg. 269, 8 Am. St. 293.

relieve himself from liability by taking it back to the place where he found it and leaving it there if the owner never regains possession.¹¹ The owner of articles lost by the action of natural forces, as a flood which has deposited logs upon the land of another, lawfully may enter upon the land and retake the property.¹²

As against everyone except the true owner¹³ or those deriving title through him, as a mortgagee, pledgee, and the like, a finder is entitled to the possession¹⁴ of the property and can maintain an action¹⁵ against anyone

11. *Ryan v. Chown*, 160 Mich. 204, 17 Detroit Leg. N. 26. In this case the lost articles were a hen turkey and ten chicks. After the owner threatened suit against the finder for not returning them, the finder took the fowls after dark to the place in the highway where they had been found and liberated them without notice to the owner.

12. *Sheldon v. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569.

13. *Clark v. Maloney* (Del.), 3 Harr. 68, 1 Gray, Cas. on Prop. 377; *Williams v. State*, 165 Ind. 472, 2 L. R. A. N. S. 248; *Lawrence v. Buck*, 62 Me. 275; *Wood v. Pierson*, 45 Mich. 313, *Pattee*, Illus. Cas. in Personalty, 59, *Lawson*, Cas. on Pers. Prop. 194, *Van Zile*, Illus. Cas. in Personalty, 82; *Tatum v. Sharpless*, 6 Phila. 18, 22 Leg. Int. 244; *Deaderick v. Oulds*, 86 Tenn. 14; *Kuykendall v. Fisher*, 61 W. Va. 87, 8 L. R. A. N. S. 94. See, also, *Adams v. Burton*, 43 Vt. 36, *Van Zile*, Illus. Cas. in Personalty, 37.

The finder of a bank-note becomes a *quasi-depositary*, and is entitled to it as against one to whom the note was delivered to see if it was good. *Tancill v. Seaton*, 69 Va. (28 Gratt.) 601, 24 Va. Rep. Ann. 192, 26 Am. Rep. 380.

Money in an old safe, which accidentally is pushed back of the wooden lining through a crack therein, belongs to a finder in possession of the safe, as against the owner of the safe who did not put the money into the safe and was ignorant of it, having bought the safe second-hand. *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, 1 Gray, Cas. on Prop. 380, *Lawson*, Cas. on Pers. Prop. 182.

14. *Chase v. Corcoran*, 106 Mass. 236, *Van Zile*, Illus. Cas. in Personalty, 81.

15. A finder can recover in trover from anyone not the true owner. *Brandon v. Planters B'k*, 1 Stew. 320, 18 Am. Dec. 48; *Clark v. Maloney*, (Del.) 3 Harr. 68, 1 Gray, Cas. on Prop. 377; *Pinkham v. Geer*, 3 N. H. 484; *McLaughlin v. Waite*, 9 Cow. 670, *aff'd* 5 Wend. 404; *Armory v. Delamirie*, 1 Str. 504.

injuring¹⁶ it or wrongfully refusing to redeliver it to him; nor does it make any difference where the article was found.¹⁷ The owner of the land does not have any superior right to any article lost thereon,¹⁸ especially if the public have an implied license to enter upon the premises; nor does it make any difference that the finder is an employee¹⁹ and finds the article upon the premises of his employer while engaged in his duties. There seem to be two exceptions to this rule; first, if the article has been long imbedded in the soil, the person having an interest in the soil is considered as having the right to possession of the article,²⁰ the fact of the article being con-

16. *Peoria Co. v. McIntire*, 39 Ill. 298.

17. Money in an old safe bought second-hand and left by the buyer with a blacksmith for sale, belongs to the bailor as against the ballor. *Durfee v. Jones*, 11 R. I. 588, 23 Am. Rep. 528, 1 Gray, Cas. on Prop. 380, Lawson, Cas. on Pers. Prop. 182.

18. *Whitman v. Muskegon Co.*, 152 Mich. 645; *Deaderick v. Oulds*, 86 Tenn. 14.

19. *Danielson v. Roberts*, 44 Oreg. 108, 102 Am. St. 627, 65 L. R. A. 526. A servant in a hotel. *Hamaker v. Blanchard*, 90 Pa. St. 77, 35 Am. Rep. 664, 1 Gray, Cas. on Prop. 382, Pattee, Illus. Cas. in Personalty, 54, Lawson, Cas. on Pers. Prop. 189, Van Zile, Illus. Cas. in Personalty, 79. An employee in a paper-mill assorting old paper. *Bowen v. Sullivan*, 62 Ind. 281, 30 Am. Rep. 172, 18 Am. Law Reg. N. S. 686. A conductor on a railway. *New York Co. v. Hawa*, 56 N. Y. 175; *Tatum v. Sharpless*, 6 Phila. 18, 22 Leg. Int. 244.

20. The possessor of land is entitled to two gold rings found by a laborer in some mud thrown out while cleaning a pool. *South Waterworks v. Sharman*, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460.

A boat imbedded in the soil about two thousand years belongs to the owner of the land. *Elwes v. Brigg Co.*, 33 Ch. D. 562.

Dishes buried about one hundred and fifty years belong to the landowner as against his lessee who found them; *Burdick v. Chesebrough*, (N. Y.) 94 App. Div. 532, 7 Law Notes, 160; and the same rule was applied to gold-bearing quartz buried in the ground. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 447.

Aerolites become realty by accession and belong to the owner of the soil; *Ewell, Fixt.* (2d ed.) 83; *Goddard v. Winchell*, 86 Iowa, 71, 41 Am. St. 48, 35 Cent. Law J. 365, 17 L. R. A. 788, Lawson, Cas. on Pers. Prop. 23; *Maas v. Amana Soc.* (Iowa), *Chicago Tribune* of July 9, 1877, p. 2; but they never were personal property, and were not lost.

nected with the land giving it some of the characteristics of realty. The other exception is that where the article has been driven on the shore so as to be regarded as wreck, the right of possession is in the owner of the soil as against a trespasser.²¹

If an article is mislaid and not technically lost, the proprietor²² of the place where the article is discovered has the right of possession as against everyone but the depositor, first, for the reason that the *prima facie* presumption of abandonment, upon which the rights of a finder seem, at least partially, to be based, is absent;²³ and, second, by deliberately depositing the article upon the premises of another and parting with actual possession for the moment, retaining constructive possession only, the owner theoretically makes a *quasi*-bailee²⁴ of the person in charge of the place and not any stranger that subsequently may happen to be present. Frequently a person remembers where he mislaid property and naturally would return there for it, whereas the locality of a loss is not so definitely recalled.

The rule that a finder of a lost article is entitled to its possession and all rights except as against the original owner, generally does not apply to choses in action. Thus the finder of a lottery ticket²⁵ would not be entitled to the prize drawn thereby; nor could the finder of a promissory note²⁶ payable to bearer recover anything from the maker. In these cases the evidence only is lost and not the right, which the loser retains notwithstanding the

21. *Barker v. Bates*, 30 Mass. 255, 23 Am. Dec. 678, 1 Gray, Cas. on Prop. 376.

22. *McAvoy v. Medina*, 93 Mass. 548, 87 Am. Dec. 733, 1 Gray, Cas. on Prop. 378, *Pattee*, Illus. Cas. in Personalty, 70, *Van Zile*, Illus. Cas. in Personalty, 73; *Loucks v. Gallogly* (N. Y.), 1 Misc. 22.

23. *Ferguson v. Ray*, 44 Oreg. 557, 1 L. R. A. N. S. 477.

24. *Deaderick v. Oulds*, 86 Tenn. 14.

25. *McLaughlin v. Walte*, 5 Wend. 404, 21 Am. Dec. 232.

26. *Hinton's Case*. 2 Show. 235.

loss of his written evidence;²⁷ and he can recover from the debtor by orally proving his right. If an undorsed²⁸ negotiable instrument, payable to a designated person, be lost by the payee, or if a note be lost after maturity,²⁹ it would be impossible for any other person to acquire rights therein except equitable ones; and the loser could recover even if the instrument was indorsed or was payable to bearer and lost before maturity, provided it is not produced when due, by giving a bond to indemnify the party liable thereon in event of such instrument having reached the hands of a holder for value without notice who compels payment a second time. However, if the evidence of indebtedness is one that commonly is designated as money and passes as such, as a bank note,³⁰ the finder has the same rights therein as he would have in a tangible article.

The right of property in a derelict is not in the salvors thereof although they have a right to possession until it is brought into port; but it then should be returned to its owners if claimed and salvage paid,³¹ otherwise it belongs to the government.³² There is this distinction between a derelict and property abandoned on land, that in the latter case abandonment is voluntary while at sea it is from necessity.³³

§ 334. Rights of Finder—Use—Expense. A person taking charge of lost property is under an obligation to preserve¹ it, and if preservation requires use he may use

27. *Smith v. Nelson* (S. Car.), 65 So. 261.

28. *Chaudron v. Hunt*, 3 Stew. 31, 20 Am. Dec. 60; *Garvin v. Wiswell*, 33 Ill. 215.

29. *Brent v. Ervin*, 15 La. (3 Mart. N. S.) 303, 15 Am. Dec. 157.

30. *Tancil v. Seaton*, 69 Va. (28 Gratt.) 601, 24 Va. Rep. Ann. 192, 26 Am. Rep. 380.

31. *Lewis v. The Elizabeth*, 1 Ware, 33.

32. *Peabody v. Proceeds 28 Bags*, 19 Fed. Cas. No. 10,369; *The Aquila*, 1 C. Rob. 37.

33. *Warder v. La Belle Creole*, 1 Pet. Adm. 21.

1. *Ryan v. Chown*, 160 Mich. 204, 17 Detroit Leg. N. 26.

it for that purpose, as milking a cow; ² and he may incur necessary ³ and reasonable ⁴ expense in its care, which is recoverable from the owner, but the finder does not have any lien ⁵ for such expense.

§ 335. Rights of Finder—Reward. Those preserving property on the sea are entitled to a reward called salvage; but finders of property on land are not entitled to a reward unless one has been offered.⁶ Whether a person finding an article for which a reward has been offered is entitled to the reward if he was ignorant of the

2. 1 Blacks. Comm. 298.

3. *Amory v. Flynn*, 10 Johns. 102, 6 Am. Dec. 316.

4. *Reeder v. Anderson's Adm'rs*, 34 Ky. 193, *Pattee, Illus. Cas. in Personalty*, 58. Where the owner of a boat adrift and in danger of sinking, takes it from the finder, the owner is liable for the reasonable expenses incurred in keeping and repairing it. *Chase v. Corcoran*, 106 Mass. 286, *Van Zile, Illus. Cas. in Personalty*, 81.

A person is not at liberty to take possession of an article which might fare well enough without care, merely for the purpose of running up a bill for expenses; nor, in such a case, can a finder pay himself as he goes along by using the property, as in the case of a horse. He cannot be permitted to decide how much his demand for trouble and expense should be and then how much he ought to use the property to satisfy such demand. The owner has rights in these matters; otherwise he might be involved largely in debt without his knowledge and consent. Where one person gratuitously performs an act of kindness for another, the law, as a general rule, does not recognize the right to compensation for such act. If a finder, without any knowledge of the wishes of the owner, does incur expense on account of the property, trust is placed in the liberality of the owner, "for it may be that such owner did not desire to have his property disturbed, or, if lost, preferred to find it himself." *Watts v. Ward*, 1 Oreg. 86, 62 Am. Dec. 299, *Pattee, Illus. Cas. in Personalty*, 56, *Lawson, Cas. on Pers. Prop.* 191, *Van Zile, Illus. Cas. in Personalty*, 80.

5. *Preston v. Neale*, 78 Mass. 222; *Wood v. Pierson*, 45 Mich. 313, *Pattee, Illus. Cas. in Personalty*, 59, *Lawson, Cas. on Pers. Prop.* 194, *Van Zile, Illus. Cas. in Personalty*, 82; *Coverlee v. Warner*, 19 Ohio, 29; *Etter v. Edwards*, 4 Watts, 63.

6. *Wentworth v. Day*, 44 Mass. 352; *Watts v. Ward*, 1 Oreg. 86, 62 Am. Dec. 299, *Pattee, Illus. Cas. on Personalty*, 56, *Lawson, Cas. on Pers. Prop.* 191, *Van Zile, Illus. Cas. on Personalty*, 80; *Nicholson v. Chapman*, 2 H. Bl. 254.

offer at the time the article was found, has been decided differently in different states. Some courts⁷ insist that the services should have been rendered with knowledge of the offer and with a view of obtaining the reward; that upon strict legal principles there must be mutuality between the parties to a contract, which results only from an offer and acceptance, and that an offer cannot be accepted by one not aware that it has been made. Other courts⁸ hold that neither knowledge of the offer nor performance of services with a view of obtaining the reward are essential, as there is some equity if the services in fact were performed and that the benefit is just the same whether the services were rendered from mercenary or from altruistic motives. Generally anyone⁹ aware of an offer made to the public can accept it and will become entitled to a reward by rendering the required¹⁰ services in good faith.

7. *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65; *Chicago R. R. v. Sebring*, 16 Ill. App. 181; *Furman v. Parke*, 21 N. J. L. 310; *Howland v. Lounds*, 51 N. Y. 604, 10 Am. Rep. 654; *Stamper v. Temple*, 25 Tenn. 113.

8. *Eagle v. Smith*, 4 Houst. 293; *Everman v. Hyman*, 26 Ind. App. 165, 84 Am. St. 284; *Auditor v. Ballard*, 72 Ky. 572 (see, however, *Lee v. Trustees*, 37 Ky. 28); *Crawshaw v. Roxbury*, 73 Mass. 377; *Russell v. Stewart*, 44 Vt. 170; *Williams v. Carwardine*, 4 B. & Ad. 621, 5 C. & P. 566.

9. *Butler v. Leibold*, 107 Pa. St. 407; *Morris v. Kasling*, (Tex.) 15 S. W. 226 (an infant).

10. *McLeod v. Meade*, 77 Cal. 87; *Pierson v. Morch*, 82 N. Y. 502; *Brigg's Case*, 15 Ct. Cl. 48.

The object in making an offer of a reward for the recovery of a stolen horse is to stimulate effort; and if the offer is to anybody it is in effect to the successful party, and when its terms are complied with, it becomes a binding contract on the offeror. *Cummings v. Gann*, 52 Pa. St. 484.

A finder is entitled to a reward if offered by advertisement. *Deslondes v. Wilson*, 25 La. (5 La.) 397, 25 Am. Dec. 187.

It is not necessary previously to notify the offeror of an intention to act. *Harson v. Pike*, 16 Ind. 140; *Reif v. Page*, 55 Wis. 496, 42 Am. Rep. 731.

§ 336. **Rights of Finder—Lien.** If a finder is entitled to a reward he has a lien¹ on the article found, that is, can retain possession until the reward is paid or tendered, unless the offer was indefinite,² as a “liberal” reward.

§ 337. **Larceny of Found Property.** In some states found or discovered³ property may be the subject of larceny⁴ if the finder, at the time the article is found and discovered to be of value,⁵ knows or has means of ascertaining⁶ the owner or believes⁷ the owner can be found

1. *Wentworth v. Day*, 44 Mass. 352, 37 Am. Dec. 145, 1 Gray, Cas. on Prop. 364, *Pattee*, Illus. Cas. in *Personalty*, 67, *Lawson*, Cas. on Pers. Prop. 201; *Wood v. Pierson*, 45 Mich. 313, *Pattee*, Illus. Cas. in *Personalty*, 59, *Lawson*, Cas. on Pers. Prop. 194, *Van Zile*, Illus. Cas. in *Personalty*, 82. The owner might live at a distance, and if the finder were required to yield up the property and then look to the owner personally, it might result in injustice, while to allow a lien is not an injury to the owner, who constitutes the finder a bailee for hire to take possession of and to care for the property. *Baker v. Hoag*, 7 Barb. 113; *Cummings v. Gann*, 52 Pa. St. 484.

2. In such a case neither of the parties can be made the exclusive judge of the amount; and in event of dispute the amount would have to be ascertained by a judicial tribunal. It is not to be supposed that the loser is to be kept out of possession during the delays incident to litigation, and a lien rarely would be valuable to the finder except as a means of oppression and extortion. *Wilson v. Guyton*, 3 Gill, 213, 1 Gray, Cas. on Prop. 366.

3. *State v. McCann*, 19 Mo. 249; *People v. McGarren*, 17 Wend. 460, 13 N. Y. Com. Law, 199; *Lawrence v. State*, 20 Tenn. 223, 34 Am. Dec. 644.

4. *State v. Jenkins*, 2 Tyler, 377.

5. *State v. Hayes*, 98 Iowa, 619, 60 Am. St. 219, 37 L. R. A. 116.

6. *Com. v. Titus*, 116 Mass. 42, 17 Am. Rep. 138, *Pattee*, Illus. Cas. in *Personalty*, 73. Where a lost pocket-book contains notes bearing names indicating who might be the owner of the pocket-book, the finder is furnished means for finding the owner. *Allen v. State*, 91 Ala. 19, 24 Am. St. 856. The printed name and address appearing in the left hand corner of stamped envelopes charge the finder with notice of the owner. *People v. Hoban*, 147 Ill. App. 24.

7. Where the finder of a pocket-book knew from its appearance that it had been lost recently and that the loser recently had been at the point where it was found, the finder has reasonable grounds

but nevertheless intends at that time to appropriate the article to his own use.⁸ If, however, the finder does not know the owner⁹ and there are no marks¹⁰ upon the article indicating ownership, the finder cannot be convicted of larceny for appropriating the property, even though by the exercise of honest diligence the owner might have been discovered.¹¹

The reason of the distinction between these two cases is that, under the common law, larceny is not committed unless a criminal intent exists at the time possession of the article is taken. There is nothing criminal in the mere act of taking possession of something evidently lost—in fact such an act might be praiseworthy in many cases; and a subsequent intention to keep it does not constitute larceny¹² but is a conver-

for believing, at the time of finding, that the owner could be found. *Baker v. State*, 29 Ohio St. 184, 23 Am. Rep. 731, *Pattee, Illus. Cas. in Personalty*, 71, *Van Zile, Illus. Cas. in Personalty*, 84.

8. *State v. Clifford*, 14 Nev. 72, 33 Am. Rep. 526. The subsequent acts and declarations of the finder may be evidence of his intentions at the time the article was found. *Com. v. Titus*, 116 Mass. 42, 17 Am. Rep. 138, *Pattee, Illus. Cas. in Personalty*, 73. Where the finder of a pocket-book, when informed the next morning by the owner, of the loss, conceals the fact of finding and, later, when asked why he did not return the goods to the owner, replied that "Finders are keepers," an intention to appropriate the pocket-book to his own use at the time of finding is shown. *Baker v. State*, 29 Ohio St. 184, 23 Am. Rep. 731, *Pattee, Illus. Cas. in Personalty*, 71, *Van Zile, Illus. Cas. in Personalty*, 84.

9. *State v. Roper*, 14 N. Car. 473, 24 Am. Dec. 268.

10. *Lane v. People*, 10 Ill. 305 (a trunk found in the highway).

11. *People v. Cogdell*, (N. Y.) 1 Hill, 94. In this case the finder of a pocket-book containing \$600 on the highway, was suspected and demand made immediately after, but he denied the finding. As there were no marks indicating ownership it was held that he was not guilty of larceny.

12. *People v. Anderson*, 14 Johns. 294; *State v. Roper*, 14 N. Car. 473, 24 Am. Dec. 268; *Porter v. State*, 8 Tenn. 225.

This is true although the intention is formed immediately after the finding, if the owner was not known at the time of finding. *People v. Cogdell*, (N. Y.) 1 Hill, 94.

sion¹³ only, though such an act might be a crime by virtue of some statute. A person cannot steal something lawfully in his possession, as there must be a trespass¹⁴ in the taking; but if before or at the time he takes possession of an article, the finder intends to keep it as his own even though he knows or has immediate means of knowing the owner, the taking becomes unlawful, constituting larceny.

If a found article is handed to someone with a view of finding the owner¹⁵ or as a custodian,¹⁶ and the person to whom the article is delivered, has an intention at that time to appropriate it, he would be guilty of larceny, as would also anyone falsely¹⁷ claiming and taking the property.

The mere fact of the finder of money spending it after having certain knowledge of the owner, does not constitute larceny. *Baker v. State*, 29 Ohio St. 184, 23 Am. Rep. 731, *Pattee, Illus. Cas. in Personalty*, 71, *Van Zile, Illus. Cas. in Personalty*, 84.

13. *Lane v. People*, 10 Ill. 305.

14. *Pritchett v. State*, 34 Tenn. 285, 62 Am. Dec. 468.

15. *State v. Levine*, 79 Conn. 714, 10 L. R. A. N. S. 286.

16. *Allen v. State*, 91 Ala. 19, 24 Am. St. 856.

17. *Williams v. State*, 165 Ind. 472, 2 L. R. A. N. S. 242.

APPENDIX.

FORM OF FIRE INSURANCE POLICY.

No. 41144.

\$10,000.00

BURNHAM FIRE INSURANCE COMPANY, OF SYRACUSE,
NEW YORK,

In Consideration of the Stipulations herein named and of One Hundred and Twenty Dollars Premium, Does Insure E. T. Lee and Oscar Hallam for the term of five years from the first day of January, 1914, at noon to the first day of January, 1919, at noon, against all direct loss or damage by fire, except as hereinafter provided, To an amount not exceeding Ten Thousand Dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit: \$10,000.00 On their three story and basement brick and stone building and additions, adjoining and communicating, occupied for private family residence purposes, including Plate, ornamental and stained Glass; permanent heating apparatus, belonging to the building insured, foundations, porches, verandas, gas and water pipes and electric wires and enunciators, window and door screens, storm doors, awnings and all permanent fixtures and decorations, situate No. 2537 Wilcox Avenue, Cleveland, Ohio.

Permission given to use natural gas for fuel, and kerosene, gas and electricity for lighting, and to remain vacant during temporary absence of the family or while seeking tenants for dwelling occupancy.

It is understood that the commencement and expiration of the term of this policy refers to noon, Central Standard Time.

Permission is granted to make ordinary alterations and repairs. Other insurance permitted.

This policy shall cover any direct loss or damage caused by lightning, except loss or damage to electrical apparatus and machinery and connections (meaning thereby the commonly accepted use of the term lightning, and in no case to include loss or damage by cyclone, tornado or windstorm), not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. *Provided*, however, if there shall be any other insurance on said property, this Company shall be liable only *pro rata* with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not.

Permission is hereby given for the using of a Gasoline Stove. It being warranted by the assured that the reservoir shall be filled by daylight only, and when the stove is not in use, and that no artificial light be permitted in the room where the reservoir is being filled, and no gasoline, except that contained in said reservoir, shall be kept within the building, and not more than five gallons in a tight and entirely closed metallic can, free from leak, on the premises adjacent thereto.¹

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained

1. That portion of the policy beginning with the description of the property insured down to this point usually appears on a separate slip, known as a "rider," which is pasted on the policy and becomes a part of it. The permits and stipulations appearing upon the rider supersede the conditions thereafter appearing if they are in conflict. If the premises are covered by a mortgage or trust deed, another rider is attached making the policy payable to such mortgagee or trustee as his interest may appear. In event of loss or damage not exceeding the full amount of insurance, which is paid by the insurer, such payment is indorsed upon the policy, which continues in force as to the balance.

or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or to replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this Company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this Company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy. It shall be optional, however, with this Company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention to do so; but there can be no abandonment to this Company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more

than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek-fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This Company shall not be liable for loss caused directly or indirectly by invasion, insurrections, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This Company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for

the renewed term, provided that any increase of hazard must be made known to this Company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the Company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retaining the customary short rate; except that when this policy is canceled by this Company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this Company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this Company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this Company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this Company, shall render a statement to this Company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this Company all the remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof.

if originals be lost, at such reasonable place as may be designated by this Company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this Company, including an award by appraisers when appraisal has been required.

This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this Company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this Company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision of condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents this thirtieth day of December, 1913. This Policy shall not be valid until Countersigned by the duly authorized Agent of the Company at Cleveland, Ohio.

JACOB SWART, Secretary. GEORGE CHASE, President. Countersigned at Cleveland, Ohio, this thirtieth day of December, 1913.

**CHARLES A. THATCHER,
Agent.**

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